# UNITED STATES REPORTS

## VOLUME 544

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## CASES ADJUDGED

IN

# THE SUPREME COURT

AT

## OCTOBER TERM, 2004

MARCH 2 THROUGH MAY 31, 2005

TOGETHER WITH OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

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FRANK D. WAGNER

REPORTER OF DECISIONS

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# JUSTICES

OF THE

# SUPREME COURT

DURING THE TIME OF THESE REPORTS

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WILLIAM H. REHNQUIST, CHIEF JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.
SANDRA DAY O'CONNOR, ASSOCIATE JUSTICE.
ANTONIN SCALIA, ASSOCIATE JUSTICE.
ANTHONY M. KENNEDY, ASSOCIATE JUSTICE.
DAVID H. SOUTER, ASSOCIATE JUSTICE.
CLARENCE THOMAS, ASSOCIATE JUSTICE.
RUTH BADER GINSBURG, ASSOCIATE JUSTICE.
STEPHEN BREYER, ASSOCIATE JUSTICE.

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OFFICERS OF THE COURT

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*Attorney General Gonzales was presented to the Court on March 29, 2005. See *post*, p. v.

# SUPREME COURT OF THE UNITED STATES

## ALLOTMENT OF JUSTICES

*It is ordered* that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective September 30, 1994, viz.:

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, DAVID H. SOUTER, Associate Justice.

For the Second Circuit, RUTH BADER GINSBURG, Associate Justice.

For the Third Circuit, DAVID H. SOUTER, Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, ANTONIN SCALIA, Associate Justice.

For the Sixth Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, CLARENCE THOMAS, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, STEPHEN BREYER, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

September 30, 1994.

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(For next previous allotment, and modification, see 509 U. S., p. VI, and 512 U. S., p. V.)

# PRESENTATION OF THE ATTORNEY GENERAL

## SUPREME COURT OF THE UNITED STATES

TUESDAY, MARCH 29, 2005

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Present: CHIEF JUSTICE REHNQUIST, JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE SOUTER, JUSTICE THOMAS, JUSTICE GINSBURG, and JUSTICE BREYER.

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THE CHIEF JUSTICE said:

The Court now recognizes the Acting Solicitor General of the United States.

The Acting Solicitor General addressed the Court as follows:

MR. CHIEF JUSTICE, and may it please the Court. I have the honor to present to the Court the eightieth Attorney General of the United States, the Honorable Alberto R. Gonzales of Texas.

THE CHIEF JUSTICE said:

General Gonzales, on behalf of the Court, I welcome you as the chief law officer of the United States government and as an officer of this Court. We welcome you to the performance of your very important duties that will rest upon you by virtue of your office. Your commission as Attorney General of the United States will be placed in the records of the Court, and we wish you well in your new office.

The Attorney General said:

Thank you, MR. CHIEF JUSTICE.

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# CASES ADJUDGED

IN THE

# SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2004

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## TENET ET AL. *v.* DOE ET UX.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03–1395. Argued January 11, 2005—Decided March 2, 2005

Respondent husband and wife filed suit against the United States and the Director of the Central Intelligence Agency (CIA), asserting estoppel and due process claims for the CIA's alleged failure to provide them with financial assistance it had promised in return for their espionage services during the Cold War. The District Court denied the Government's motions to dismiss and for summary judgment, finding that respondents' claims were not barred by the rule of *Totten* v. *United States*, 92 U. S. 105, prohibiting suits against the Government based on covert espionage agreements. Affirming in relevant part, the Ninth Circuit reasoned that *Totten* posed no bar to reviewing some of respondents' claims and thus the case could proceed to trial, subject to the Government's asserting the evidentiary state secrets privilege and the District Court's resolving that issue.

*Held:* Respondents' suit is barred by the *Totten* rule. In *Totten*, this Court concluded with no difficulty that the President had the authority to bind the United States to contracts with secret agents, observed that the very essence of such a contract was that it was secret and had to remain so, and found that allowing a former spy to bring suit to enforce such a contract would be entirely incompatible with the contract's nature. The Ninth Circuit was quite wrong in holding that *Totten* does not require dismissal of respondents' claims. It reasoned that *Totten* developed merely a contract rule, prohibiting breach-of-contract claims seeking to enforce an espionage agreement's terms but not barring due

Syllabus

process or estoppel claims. However, *Totten* was not so limited. It precludes judicial review in cases such as respondents' where success depends on the existence of their secret espionage relationship with the Government. *Id.*, at 107. The Ninth Circuit also claimed that *Totten* had been recast simply as an early expression of the evidentiary "state secrets" privilege, rather than a categorical bar to respondents' claims, relying mainly on *United States* v. *Reynolds*, 345 U. S. 1, in which widows of civilians killed in a military plane crash sought privileged military information in their wrongful-death action against the Government. While the *Reynolds* Court looked to *Totten* in invoking the "well established" state secrets privilege, it in no way signaled a retreat from *Totten*'s broader holding that lawsuits premised on alleged espionage agreements are altogether forbidden. The Court later credited *Totten*'s more sweeping holding in *Weinberger* v. *Catholic Action of Haw./Peace Ed. Project*, 454 U. S. 139, 146–147, thus confirming its continued validity. *Reynolds* therefore cannot plausibly be read to have replaced *Totten*'s categorical bar in the distinct class of cases that depend upon clandestine spy relationships. Nor does *Webster* v. *Doe*, 486 U. S. 592, which addressed constitutional claims made by acknowledged (though covert) CIA employees, support respondents' claim. Only in the case of an alleged former spy is *Totten*'s core concern implicated: preventing the existence of the plaintiff's relationship with the Government from being revealed. The state secrets privilege and the use of *in camera* judicial proceedings simply cannot provide the absolute protection the Court found necessary in enunciating the *Totten* rule. The possibility that a suit may proceed and an espionage relationship may be revealed is unacceptable. Forcing the Government to litigate these claims would also make it vulnerable to "graymail," *i. e.*, individual lawsuits brought to induce the CIA to settle a case out of fear that litigation would reveal classified information that might undermine covert operations. And requiring the Government to invoke the privilege on a case-by-case basis risks the perception that it is either confirming or denying relationships with individual plaintiffs. Pp. 7–11.

329 F. 3d 1135, reversed.

REHNQUIST, C. J., delivered the opinion for a unanimous Court. STEVENS, J., filed a concurring opinion, in which GINSBURG, J., joined, *post*, p. 11. SCALIA, J., filed a concurring opinion, *post*, p. 12.

*Acting Solicitor General Clement* argued the cause for petitioners. With him on the briefs were *Assistant Attorney General Keisler, Deputy Assistant Attorney General*

*Katsas*, *Lisa S. Blatt*, *Barbara L. Herwig*, and *H. Thomas Byron III*.

*David J. Burman* argued the cause for respondents. With him on the brief were *Steven W. Hale*, *Elizabeth A. Alaniz*, and *Marie Aglion*.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In *Totten* v. *United States*, 92 U. S. 105 (1876), we held that public policy forbade a self-styled Civil War spy from suing the United States to enforce its obligations under their secret espionage agreement. Respondents here, alleged former Cold War spies, filed suit against the United States and the Director of the Central Intelligence Agency (CIA), asserting estoppel and due process claims for the CIA's alleged failure to provide respondents with the assistance it had promised in return for their espionage services. Finding that *Totten* did not bar respondents' suit, the District Court and the Court of Appeals for the Ninth Circuit held that the case could proceed. We reverse because this holding contravenes the longstanding rule, announced more than a century ago in *Totten*, prohibiting suits against the Government based on covert espionage agreements.

Respondents, a husband and wife who use the fictitious names John and Jane Doe, brought suit in the United States District Court for the Western District of Washington.[1] According to respondents, they were formerly citizens of a foreign country that at the time was considered to be an enemy of the United States, and John Doe was a high-ranking diplomat for the country. After respondents expressed interest in defecting to the United States, CIA agents persuaded them to remain at their posts and conduct espionage for the

[1] The Government has neither confirmed nor denied any of respondents' allegations. We therefore describe the facts as asserted in respondents' second amended complaint. See App. to Pet. for Cert. 128a–136a. They are, of course, no more than allegations.

United States for a specified period of time, promising in return that the Government "would arrange for travel to the United States and ensure financial and personal security for life." App. to Pet. for Cert. 122a. After "carrying out their end of the bargain" by completing years of purportedly high-risk, valuable espionage services, *id.*, at 123a, respondents defected (under new names and false backgrounds) and became United States citizens, with the Government's help. The CIA designated respondents with "PL–110" status and began providing financial assistance and personal security.[2]

With the CIA's help, respondent John Doe obtained employment in the State of Washington. As his salary increased, the CIA decreased his living stipend until, at some point, he agreed to a discontinuation of benefits while he was working. Years later, in 1997, John Doe was laid off after a corporate merger. Because John Doe was unable to find new employment as a result of CIA restrictions on the type

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[2] While the Government neither confirms nor denies that respondents are part of any "PL–110" program, the parties agree this reference is to 50 U. S. C. § 403h, a provision enacted as part of the Central Intelligence Agency Act of 1949, § 8, 63 Stat. 212 (renumbered § 7, 72 Stat. 337). This provision allows a limited number of aliens and members of their immediate families per year to be admitted to the United States for permanent residence, regardless of their admissibility under the immigration laws, upon a determination by the Director of the CIA, the Attorney General, and the Commissioner of Immigration that admission of the particular alien "is in the interest of national security or essential to the furtherance of the national intelligence mission." § 403h. However, nothing in this statute, nor anything in the redacted CIA regulations and related materials respondents cite, see Brief for Respondents 41–43; App. to Brief in Opposition 41–50, represents an enforceable legal commitment by the CIA to provide support to spies that may be admitted into the United States under § 403h. See also App. to Pet. for Cert. 145a (decl. of William McNair ¶ 5 (Information Review Officer for the CIA's Directorate of Operations) (stating, based on his search of regulations and internal CIA policies, that he "can inform the court unequivocally that there are *no* Agency or other US federal regulations that require the CIA to provide lifetime subsistence assistance to individuals brought into the United States under the authority of PL–110" (emphasis in original))).

of jobs he could hold, respondents contacted the CIA for financial assistance.[3] Denied such assistance by the CIA, they claim they are unable to properly provide for themselves. Thus, they are faced with the prospect of either returning to their home country (where they say they face extreme sanctions), or remaining in the United States in their present circumstances.

Respondents assert, among other things, that the CIA violated their procedural and substantive due process rights by denying them support and by failing to provide them with a fair internal process for reviewing their claims. They seek injunctive relief ordering the CIA to resume monthly financial support pending further agency review. They also request a declaratory judgment stating that the CIA failed to provide a constitutionally adequate review process, and detailing the minimal process the agency must provide. Finally, respondents seek a mandamus order requiring the CIA to adopt agency procedures, to give them fair review, and to provide them with security and financial assistance.

The Government moved to dismiss the complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), principally on the ground that *Totten* bars respondents' suit. The District Court dismissed some of respondents' claims but denied the Government's *Totten* objection, ruling that the due process claims could proceed. 99 F. Supp. 2d 1284, 1289–1294 (WD Wash. 2000). After minimal discovery, the Gov-

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[3] Respondents document their alleged series of contacts with the CIA. See *id.*, at 128a–136a (Second Amended Complaint). For instance, respondents allegedly received a letter from the CIA in June 1997, expressing regret that the agency no longer had funds available to provide assistance. *Id.*, at 128a. Later, respondents claim they were told the agency determined "the benefits previously provided were adequate for the services rendered." *Id.*, at 129a. Although the CIA apparently did not disclose to respondents the agency's appeals process, respondents were permitted to appeal the initial determination both to the Director of the CIA and to a panel of former agency officials called the Helms Panel; both appeals were denied. *Id.*, at 129a–132a.

ernment renewed its motion to dismiss based on *Totten*, and it moved for summary judgment on respondents' due process claims. Apparently construing the complaint as also raising an estoppel claim, the District Court denied the Government's motions, ruled again that *Totten* did not bar respondents' claims, and found there were genuine issues of material fact warranting a trial on respondents' due process and estoppel claims. App. to Pet. for Cert. 85a–94a. The District Court certified an order for interlocutory appeal and stayed further proceedings pending appeal. *Id.*, at 79a–83a.

A divided panel of the Court of Appeals for the Ninth Circuit affirmed in relevant part. 329 F. 3d 1135 (2003). It reasoned that *Totten* posed no bar to reviewing some of respondents' claims and thus that the case could proceed to trial, subject to the Government's asserting the evidentiary state secrets privilege and the District Court's resolving that issue. 329 F. 3d, at 1145–1155. Over dissent, the Court of Appeals denied a petition for rehearing en banc. 353 F. 3d 1141 (CA9 2004). The Government sought review, and we granted certiorari.[4] 542 U. S. 936 (2004).

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[4] Preliminarily, we must address whether *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83 (1998), prevents us from resolving this case based on the *Totten* issue. In *Steel Co.*, we adhered to the requirement that a court address questions pertaining to its or a lower court's jurisdiction before proceeding to the merits. 523 U. S., at 94–95. In the lower courts, in addition to relying on *Totten*, the Government argued that the Tucker Act, 28 U. S. C. § 1491(a)(1), required that respondents' claims be brought in the Court of Federal Claims, rather than in the District Court. The District Court and the Court of Appeals rejected this argument, and the Government did not seek review on this question in its petition for certiorari. Pet. for Cert. 8, n. 2.

We may assume for purposes of argument that this Tucker Act question is the kind of jurisdictional issue that *Steel Co.* directs must be resolved before addressing the merits of a claim. Cf. *United States* v. *Mitchell*, 463 U. S. 206, 212, 215 (1983) (holding that "the Tucker Act effects a waiver of sovereign immunity" and observing that "the existence of consent [to be sued] is a prerequisite for jurisdiction"). Nevertheless, application of the *Totten* rule of dismissal, like the abstention doctrine of *Younger* v.

In *Totten*, the administrator of William A. Lloyd's estate brought suit against the United States to recover compensation for services that Lloyd allegedly rendered as a spy during the Civil War. 92 U. S. 105. Lloyd purportedly entered into a contract with President Lincoln in July 1861 to spy behind Confederate lines on troop placement and fort plans, for which he was to be paid $200 a month. *Id.*, at 105–106. The lower court had found that Lloyd performed on the contract but did not receive full compensation. *Id.*, at 106. After concluding with "no difficulty," *ibid.*, that the President had the authority to bind the United States to contracts with secret agents, we observed that the very essence of the alleged contract between Lloyd and the Government was that it was secret, and had to remain so:

> "The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be for ever sealed respecting the relation of either to the matter. This

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*Harris*, 401 U. S. 37 (1971), or the prudential standing doctrine, represents the sort of "threshold question" we have recognized may be resolved before addressing jurisdiction. See *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U. S. 574, 585 (1999) ("It is hardly novel for a federal court to choose among threshold grounds for denying audience to a case on the merits"); see also *Kowalski* v. *Tesmer*, 543 U. S. 125, 129 (2004) (assuming Article III standing in order to "address the alternative threshold question whether" attorneys had third-party standing); *Steel Co.*, *supra*, at 100, n. 3 (approving a decision resolving *Younger* abstention before addressing subject-matter jurisdiction). It would be inconsistent with the unique and categorical nature of the *Totten* bar—a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry—to first allow discovery or other proceedings in order to resolve the jurisdictional question. Thus, whether or not the Government was permitted to waive the Tucker Act question, we may dismiss respondents' cause of action on the ground that it is barred by *Totten*.

> condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent." *Ibid.*

Thus, we thought it entirely incompatible with the nature of such a contract that a former spy could bring suit to enforce it. *Id.*, at 106–107.

We think the Court of Appeals was quite wrong in holding that *Totten* does not require dismissal of respondents' claims. That court, and respondents here, reasoned first that *Totten* developed merely a contract rule, prohibiting breach-of-contract claims seeking to enforce the terms of espionage agreements but not barring claims based on due process or estoppel theories. In fact, *Totten* was not so limited: "[P]ublic policy forbids the maintenance of *any suit* in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential." *Id.*, at 107 (emphasis added); see also *ibid.* ("The secrecy which such contracts impose precludes *any action* for their enforcement" (emphasis added)). No matter the clothing in which alleged spies dress their claims, *Totten* precludes judicial review in cases such as respondents' where success depends upon the existence of their secret espionage relationship with the Government.

Relying mainly on *United States* v. *Reynolds*, 345 U. S. 1 (1953), the Court of Appeals also claimed that *Totten* has been recast simply as an early expression of the evidentiary "state secrets" privilege, rather than a categorical bar to their claims. *Reynolds* involved a wrongful-death action brought under the Federal Tort Claims Act, 28 U. S. C. § 1346, by the widows of three civilians who died in the crash of a military B–29 aircraft. 345 U. S., at 2–3. In the course of discovery, the plaintiffs sought certain investigation-

related documents, which the Government said contained "'highly secret,'" privileged military information. *Id.*, at 3–4. We recognized "the privilege against revealing military secrets, a privilege which is well established in the law of evidence," *id.*, at 6–7, and we set out a balancing approach for courts to apply in resolving Government claims of privilege, *id.*, at 7–11. We ultimately concluded that the Government was entitled to the privilege in that case. *Id.*, at 10–12.

When invoking the "well established" state secrets privilege, we indeed looked to *Totten*. *Reynolds*, *supra*, at 7, n. 11 (citing *Totten*, *supra*, at 107). See also Brief for United States in *United States* v. *Reynolds*, O. T. 1952, No. 21, pp. 36, 42 (citing *Totten* in support of a military secrets privilege). But that in no way signaled our retreat from *Totten*'s broader holding that lawsuits premised on alleged espionage agreements are altogether forbidden. Indeed, our opinion in *Reynolds* refutes this very suggestion: Citing *Totten* as a case "where the very subject matter of the action, a contract to perform espionage, was a matter of state secret," we declared that such a case was to be "dismissed *on the pleadings without ever reaching the question of evidence*, since it was so obvious that the action should never prevail over the privilege." 345 U. S., at 11, n. 26 (emphasis added).

In a later case, we again credited the more sweeping holding in *Totten*, thus confirming its continued validity. See *Weinberger* v. *Catholic Action of Haw./Peace Ed. Project*, 454 U. S. 139, 146–147 (1981) (citing *Totten* in holding that "whether or not the Navy has complied with [§ 102(2)(C) of the National Environmental Policy Act of 1969, 83 Stat. 853, 42 U. S. C. § 4332(2)(C)] 'to the fullest extent possible' is beyond judicial scrutiny in this case," where, "[d]ue to national security reasons," the Navy could "neither admit nor deny" the fact that was central to the suit, *i. e.*, "that it propose[d] to store nuclear weapons" at a facility). *Reynolds* therefore cannot plausibly be read to have replaced the categorical

*Totten* bar with the balancing of the state secrets evidentiary privilege in the distinct class of cases that depend upon clandestine spy relationships.

Nor does *Webster* v. *Doe*, 486 U. S. 592 (1988), support respondents' claim. There, we held that § 102(c) of the National Security Act of 1947, 61 Stat. 498, 50 U. S. C. § 403(c), may not be read to exclude judicial review of the constitutional claims made by a former CIA employee for alleged discrimination. 486 U. S., at 603. In reaching that conclusion, we noted the "'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Ibid.* But there is an obvious difference, for purposes of *Totten*, between a suit brought by an acknowledged (though covert) employee of the CIA and one filed by an alleged former spy. Only in the latter scenario is *Totten*'s core concern implicated: preventing the existence of the plaintiff's relationship with the Government from being revealed.[5] That is why the CIA regularly entertains Title VII claims concerning the hiring and promotion of its employees, as we noted in *Webster*, *supra*, at 604, yet *Totten* has long barred suits such as respondents'.

There is, in short, no basis for respondents' and the Court of Appeals' view that the *Totten* bar has been reduced to an example of the state secrets privilege. In a far closer case than this, we observed that if the "precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court

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[5] The Court of Appeals apparently believed that the plaintiff's relationship with the CIA *was* secret in *Webster*, just as in this case. See 329 F. 3d 1135, 1153 (CA9 2003). It is true that the plaintiff in *Webster* proceeded under a pseudonym because "his status as a CIA employee cannot be publicly acknowledged." Brief for United States in *Webster* v. *Doe*, O. T. 1987, No. 86–1294, p. 3, n. 1. But the fact that the plaintiff in *Webster* kept his *identity* secret did not mean that the employment *relationship* between him and the CIA was not known and admitted by the CIA.

of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989).

We adhere to *Totten*. The state secrets privilege and the more frequent use of *in camera* judicial proceedings simply cannot provide the absolute protection we found necessary in enunciating the *Totten* rule. The possibility that a suit may proceed and an espionage relationship may be revealed, if the state secrets privilege is found not to apply, is unacceptable: "Even a small chance that some court will order disclosure of a source's identity could well impair intelligence gathering and cause sources to 'close up like a clam.'" *CIA* v. *Sims*, 471 U. S. 159, 175 (1985). Forcing the Government to litigate these claims would also make it vulnerable to "graymail," *i. e.*, individual lawsuits brought to induce the CIA to settle a case (or prevent its filing) out of fear that any effort to litigate the action would reveal classified information that may undermine ongoing covert operations. And requiring the Government to invoke the privilege on a case-by-case basis risks the perception that it is either confirming or denying relationships with individual plaintiffs.

The judgment of the Court of Appeals is reversed.

*It is so ordered.*

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, concurring.

In *Totten* v. *United States*, 92 U. S. 105 (1876), the Court held that an alleged oral agreement between a deceased spy and President Lincoln was unenforceable. There may be situations in which the national interest would be well served by a rule that permitted similar commitments made by less senior officers to be enforced in court, subject to procedures designed to protect sensitive information. If that be so, Congress can modify the federal common-law rule announced in *Totten*. For the purposes of today's decision,

which I join, the doctrine of *stare decisis* provides a sufficient justification for concluding that the complaint is without merit. The Court wisely decides that the absence of an enforceable agreement requires that respondents' constitutional and other claims be dismissed without first answering an arguably antecedent jurisdictional question. See *ante*, at 6–7, n. 4; see also *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 117–123 (1998) (STEVENS, J., concurring in judgment).

JUSTICE SCALIA, concurring.

I join the Court's opinion because I do not agree with JUSTICE STEVENS's concurrence, painting today's action as a vindication of his opinion concurring in the judgment in *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 112 (1998), in which he would have held that a jurisdictional bar does not prevent the resolution of a merits issue. When today's opinion refers to the issue in *Totten* v. *United States*, 92 U. S. 105 (1876), as "the sort of 'threshold question' we have recognized may be resolved before addressing jurisdiction," *ante*, at 7, n. 4, it is surely not referring to the run-of-the-mill, nonthreshold *merits* question whether a cause of action exists. And when it describes "the unique and categorical nature of the *Totten* bar—a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry," *ibid.*, it is assuredly not describing the mere everyday absence of a cause of action. As applied today, the bar of *Totten* is a jurisdictional one.

Of course even if it were not, given the squarely applicable precedent of *Totten*, the absence of a cause of action is so clear that respondents' claims are frivolous—establishing another *jurisdictional* ground for dismissal that the *Steel Co.* majority opinion acknowledges. See 523 U. S., at 89.

Syllabus

# SHEPARD *v.* UNITED STATES

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 03–9168. Argued November 8, 2004—Decided March 7, 2005

After petitioner Shepard pleaded guilty to being a felon in possession of a firearm in violation of 18 U. S. C. § 922(g)(1), the Government sought to increase his sentence from a 37-month maximum to the 15-year minimum that § 924(e), popularly known as the Armed Career Criminal Act (ACCA), mandates for such felons who have three prior convictions for violent felonies or drug offenses. Shepard's predicate felonies were Massachusetts burglary convictions entered upon guilty pleas. This Court has held that only "generic burglary"—meaning, among other things, that it was committed in a building or enclosed space—is a violent crime under the ACCA, *Taylor* v. *United States*, 495 U. S. 575, 599, and that a court sentencing under the ACCA can look to statutory elements, charging documents, and jury instructions to determine whether an earlier conviction after a jury trial was for generic burglary in States (like Massachusetts) with broader burglary definitions, *id.*, at 602. Refusing to consider the 15-year minimum, the District Court found that a *Taylor* investigation did not show that Shepard had three generic burglary convictions and rejected the Government's argument that the court should examine police reports and complaint applications in determining whether Shepard's guilty pleas admitted and supported generic burglary convictions. The First Circuit vacated, ruling that such reports and applications should be considered. On remand, the District Court again declined to impose the enhanced sentence. The First Circuit vacated.

*Held:* The judgment is reversed, and the case is remanded.

348 F. 3d 308, reversed and remanded.

JUSTICE SOUTER delivered the opinion of the Court, except as to Part III, concluding that enquiry under the ACCA to determine whether a guilty plea to burglary under a nongeneric statute necessarily admitted elements of the generic offense is limited to the terms of the charging document, to the terms of a plea agreement or transcript of colloquy between judge and defendant in which the defendant confirmed the factual basis for the plea, or to some comparable judicial record of this information. Guilty pleas may establish ACCA predicate offenses, and *Taylor*'s reasoning controls the identification of generic convictions following pleas, as well as convictions on verdicts, in States with nonge-

neric offenses. The ACCA nowhere provides that convictions in tried and pleaded cases should be regarded differently, and nothing in *Taylor*'s rationale limits it to prior jury convictions. This Court, then, must find the right analogs for applying *Taylor* to pleaded cases. The *Taylor* Court drew a pragmatic conclusion about the best way to identify generic convictions in jury cases. In cases tried without a jury, the closest analogs to jury instructions would be a bench-trial judge's formal ruling of law and finding of fact; in pleaded cases, they would be the statement of factual basis for the charge shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea. A later court could generally tell from such material whether the prior plea had "necessarily" rested on the fact identifying the burglary as generic. *Taylor, supra*, at 602. The Government's arguments for a wider evidentiary cast that includes documents submitted to lower courts even prior to charges amount to a call to ease away from *Taylor*'s conclusion that respect for congressional intent and avoidance of collateral trials require confining generic conviction evidence to the convicting court's records approaching the certainty of the record of conviction in a generic crime State. That was the heart of the *Taylor* decision, and there is no justification for upsetting that precedent where the Court is dealing with statutory interpretation and where Congress has not, in the nearly 15 years since *Taylor*, taken any action to modify the statute. Pp. 19–23, 26.

JUSTICE SOUTER, joined by JUSTICE STEVENS, JUSTICE SCALIA, and JUSTICE GINSBURG, concluded in Part III that the rule in the *Jones* v. *United States*, 526 U. S. 227, 243, n. 6, and *Apprendi* v. *New Jersey*, 530 U. S. 466, 490, line of cases—that any fact other than a prior conviction sufficient to raise the limit of the possible federal sentence must be found by a jury, absent a waiver by the defendant—is also relevant to ACCA sentencing. In a nongeneric State, the fact necessary to show a generic crime is not established by the record of conviction as it would be in a generic State when a judicial finding of a disputed prior conviction is made on the authority of *Almendarez-Torres* v. *United States*, 523 U. S. 224. Instead, the sentencing judge considering the ACCA enhancement would (on the Government's view) make a disputed finding of fact about what the defendant and state judge must have understood as the prior plea's factual basis, and the dispute raises the concern underlying *Jones* and *Apprendi:* the Sixth and Fourteenth Amendments guarantee a jury's standing between a defendant and the power of the State, and they guarantee a jury's finding of any disputed fact essential to increase a potential sentence's ceiling. The disputed fact here is too far removed from the conclusive significance of a prior judicial record,

and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute. The rule of reading statutes to avoid serious risks of unconstitutionality therefore counsels the Court to limit the scope of judicial factfinding on the disputed generic character of a prior plea. Pp. 24–26.

JUSTICE THOMAS agreed that the Court should not broaden the scope of the evidence judges may consider under *Taylor* v. *United States*, 495 U. S. 575, because it would give rise to constitutional error, not constitutional doubt. Both *Almendarez-Torres* v. *United States*, 523 U. S. 224, and *Taylor*, which permit judicial factfinding that concerns prior convictions, have been eroded by this Court's subsequent Sixth Amendment jurisprudence. Pp. 26–28.

SOUTER, J., delivered an opinion, which was for the Court except as to Part III. STEVENS, SCALIA, and GINSBURG, JJ., joined that opinion in full, and THOMAS, J., joined except as to Part III. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 26. O'CONNOR, J., filed a dissenting opinion, in which KENNEDY and BREYER, JJ., joined, *post*, p. 28. REHNQUIST, C. J., took no part in the decision of the case.

*Linda J. Thompson*, by appointment of the Court, 543 U. S. 806, argued the cause for petitioner. With her on the briefs were *John M. Thompson* and *Jeffrey T. Green*.

*John P. Elwood* argued the cause for the United States. With him on the brief were *Acting Solicitor General Clement*, *Assistant Attorney General Wray*, and *Deputy Solicitor General Dreeben*.*

JUSTICE SOUTER delivered the opinion of the Court, except as to Part III.

Title 18 U. S. C. § 924(e) (2000 ed. and Supp. II), popularly known as the Armed Career Criminal Act (ACCA), mandates a minimum 15-year prison sentence for anyone possessing a firearm after three prior convictions for serious drug offenses or violent felonies. The Act makes burglary a vio-

*Gregory L. Poe, Roy T. Englert, Jr., Max Huffman*, and *Pamela Harris* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae* urging reversal.

lent felony only if committed in a building or enclosed space ("generic burglary"), not in a boat or motor vehicle. In *Taylor* v. *United States*, 495 U. S. 575 (1990), we held that a court sentencing under the ACCA could look to statutory elements, charging documents, and jury instructions to determine whether an earlier conviction after trial was for generic burglary. The question here is whether a sentencing court can look to police reports or complaint applications to determine whether an earlier guilty plea necessarily admitted, and supported a conviction for, generic burglary. We hold that it may not, and that a later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.

## I

Petitioner Reginald Shepard was indicted under 18 U. S. C. § 922(g)(1), barring felons from possessing a firearm, and pleaded guilty. At sentencing the Government claimed that Shepard's prior convictions raised his sentencing range from between 30 and 37 months (under the United States Sentencing Guidelines) to the 15-year minimum required by § 924(e), pointing to four prior convictions entered upon Shepard's pleas of guilty under one of Massachusetts's two burglary statutes.[1] Whereas the Government said that each conviction represented a predicate ACCA offense of generic burglary, the District Court ruled that *Taylor* barred counting any of the prior convictions as predicates for the mandatory minimum. 125 F. Supp. 2d 562, 569 (Mass. 2000).

In *Taylor* we read the listing of "burglary" as a predicate "violent felony" (in the ACCA) to refer to what we called

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[1] The Government initially cited a fifth prior burglary conviction, but after failing to obtain adequate documentation about this conviction the Government focused on the other four.

"generic burglary," an "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." 495 U. S., at 599. Because statutes in some States (like Massachusetts) define burglary more broadly, as by extending it to entries into boats and cars, we had to consider how a later court sentencing under the ACCA might tell whether a prior burglary conviction was for the generic offense.[2] We held that the ACCA generally prohibits the later court from delving into particular facts disclosed by the record of conviction, thus leaving the court normally to "look only to the fact of conviction and the statutory definition of the prior offense." *Id.*, at 602. We recognized an exception to this "categorical approach" only for "a narrow range of cases where a jury [in a State with a broader definition of burglary] was actually required to find all the elements of" the generic offense. *Ibid.* We held the exception applicable "if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict . . . ." *Ibid.* Only then might a conviction under a "nongeneric" burglary statute qualify as an ACCA predicate.

In this case, the offenses charged in state complaints were broader than generic burglary, and there were of course no jury instructions that might have narrowed the charges to the generic limit. The Government nonetheless urged the District Court to examine reports submitted by the police with applications for issuance of the complaints, as a way of telling whether Shepard's guilty pleas went to generic burglaries notwithstanding the broader descriptions of the offenses in the complaints, descriptions that tracked the more expansive definition in Massachusetts law. The court concluded that *Taylor* forbade this, and that investigation within the *Taylor* limits failed to show that Shepard had

[2] Although *Taylor* involved prior burglaries, as this case does, our holding in *Taylor* covered other predicate ACCA offenses. 495 U. S., at 600.

three generic burglary convictions. The court accordingly refused to consider the 15-year mandatory minimum, though it did sentence Shepard somewhat above the standard level under the Sentencing Guidelines, on the ground that his criminal history category under the Guidelines did not do justice to his ample criminal record.

On appeal the First Circuit, following its earlier decision in *United States* v. *Harris*, 964 F. 2d 1234 (1992), vacated the sentence and ruled that complaint applications and police reports may count as "sufficiently reliable evidence for determining whether a defendant's plea of guilty constitutes an admission to a generically violent crime," 231 F. 3d 56, 67 (2000). As to each of Shepard's prior convictions, the court remanded the case for the District Court to determine whether there was "sufficiently reliable evidence that the government and the defendant shared the belief that the defendant was pleading guilty to a generically violent crime." *Id.*, at 70.

The District Court again declined to impose the 15-year mandatory minimum, even though the Government supplemented its earlier submission with police reports or complaint applications on two additional burglary convictions. The District Judge noted that the only account of what occurred at each of the prior plea hearings came from an affidavit submitted by Shepard, who stated "that none of the details in th[e police] reports w[as] ever mentioned at his pleas," that "the reports themselves were never read by the judge to him during the plea colloquy," and that at no time "was he ever asked if the information contained in the . . . [r]eports w[as] true." 181 F. Supp. 2d 14, 19 (Mass. 2002). Shepard further swore that "with respect to each report: [he] did not admit the truth of the information contained in the . . . [r]eport as part of [his] plea and [had] never admitted in court the facts alleged in the report . . . ." *Id.*, at 19–20 (internal quotation marks omitted). Based on this, the District Court found that the Government had failed to carry

its burden to demonstrate that Shepard had pleaded to three generic burglaries.

The Court of Appeals again vacated the sentence. After observing that Shepard had never "seriously disputed" that he did in fact break into the buildings described in the police reports or complaint applications, 348 F. 3d 308, 311 (CA1 2003), the court rejected the District Court's conclusion that the Government had not shown the requisite predicate offenses for the 15-year minimum sentence, *id.*, at 314. The case was remanded with instructions to impose that sentence.

We granted certiorari, 542 U. S. 918 (2004), to address divergent decisions in the Courts of Appeals applying *Taylor* when prior convictions stem from guilty pleas, not jury verdicts. We now reverse.

## II

We agree with the First Circuit (and every other Court of Appeals to speak on the matter) that guilty pleas may establish ACCA predicate offenses and that *Taylor*'s reasoning controls the identification of generic convictions following pleas, as well as convictions on verdicts, in States with nongeneric offenses. See 348 F. 3d, at 312, n. 4 (citing cases). Shepard wisely refrains from challenging this position, for the ACCA nowhere provides that convictions in tried and pleaded cases are to be regarded differently. It drops no hint that Congress contemplated different standards for establishing the fact of prior convictions, turning on the basis of trial or plea. Nothing to that effect is suggested, after all, by the language imposing the categorical approach, which refers to predicate offenses in terms not of prior conduct but of prior "convictions" and the "element[s]" of crimes. *Taylor, supra,* at 600–601 (citing 18 U. S. C. § 924(e)). Nor does the ACCA's legislative history reveal a lesser congressional preference for a categorical, as distinct from fact-specific, approach to recognizing ACCA predicates in cases resolved by plea. *Taylor, supra,* at 601. And

certainly, "the practical difficulties and potential unfairness of a factual approach are daunting," *ibid.*, no less in pleaded than in litigated cases. Finally, nothing in *Taylor*'s rationale limits it to prior jury convictions; our discussion of the practical difficulties inherent in looking into underlying circumstances spoke specifically of "cases where the defendant pleaded guilty, [in which] there often is no record of the underlying facts." *Ibid.* Our job, then, is to find the right analogs for applying the *Taylor* rule to pleaded cases.

The *Taylor* Court drew a pragmatic conclusion about the best way to identify generic convictions in jury cases, while respecting Congress's adoption of a categorical criterion that avoids subsequent evidentiary enquiries into the factual basis for the earlier conviction. The Court held that generic burglary could be identified only by referring to charging documents filed in the court of conviction, or to recorded judicial acts of that court limiting convictions to the generic category, as in giving instruction to the jury.

The Court did not, however, purport to limit adequate judicial record evidence strictly to charges and instructions, *id.*, at 602 (discussing the use of these documents as an "example"), since a conviction might follow trial to a judge alone or a plea of guilty. In cases tried without a jury, the closest analogs to jury instructions would be a bench-trial judge's formal rulings of law and findings of fact, and in pleaded cases they would be the statement of factual basis for the charge, Fed. Rule Crim. Proc. 11(a)(3), shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea.[3] With

[3] Several Courts of Appeals have taken a similar view, approving the use of some or all of these documents. *United States* v. *Bonat*, 106 F. 3d 1472, 1476–1477 (CA9 1997); *United States* v. *Maness*, 23 F. 3d 1006, 1009–1010 (CA6 1994); *United States* v. *Smith*, 10 F. 3d 724, 733–734 (CA10 1993) *(per curiam)* (construing United States Sentencing Commission, Guidelines Manual §4B1.2 (Nov. 1990)).

such material in a pleaded case, a later court could generally tell whether the plea had "necessarily" rested on the fact identifying the burglary as generic, *Taylor, supra,* at 602, just as the details of instructions could support that conclusion in the jury case, or the details of a generically limited charging document would do in any sort of case.

The Government argues for a wider evidentiary cast, however, going beyond conclusive records made or used in adjudicating guilt and looking to documents submitted to lower courts even prior to charges. It argues for considering a police report submitted to a local court as grounds for issuing a complaint under a nongeneric statute; if that report alleges facts that would satisfy the elements of a generic statute, the report should suffice to show that a later plea and conviction were for a predicate offense under the ACCA. There would be no reason for concern about unavailable witnesses or stale memories, the Government points out, and such limited enquiry would be consistent with *Taylor* because "[t]he underlying purpose [would be] the same as in examining the charging paper and jury instructions (which the Court endorsed in *Taylor*): to determine the nature of the offense of which petitioner was convicted, rather than to determine what he actually did." Brief for United States 22–23. The Government stresses three points.

First, it says that the more accommodating view of evidence competent to prove that the plea was to a generic offense will yield reliable conclusions. Although the records of Shepard's pleas with their notations that he "[a]dmit[ted] suff[icient] facts" do not necessarily show that he admitted entering buildings or structures, as would be true under a generic burglary statute or charge, the police reports suffice to show that the record of admitting sufficient facts "can only have plausibly rested on petitioner's entry of a building." *Id.,* at 25.

Second, the Government pulls a little closer to *Taylor*'s demand for certainty when identifying a generic offense by

emphasizing that the records of the prior convictions used in this case are in each instance free from any inconsistent, competing evidence on the pivotal issue of fact separating generic from nongeneric burglary. "[T]here is nothing in the record to indicate that petitioner had pleaded guilty based on entering a ship or vehicle on any of the occasions at issue." Brief for United States 16.

Finally, the Government supports its call for a more inclusive standard of competent evidence by invoking the virtue of a nationwide application of a federal statute unaffected by idiosyncrasies of recordkeeping in any particular State. A bar on review of documents like police reports and complaint applications would often make the ACCA sentencing enhancement "hinge on the happenstance of state court record-keeping practices and the vagaries of state prosecutors' charging practices." Brief in Opposition 13 (internal quotation marks omitted).

On each point, however, the Government's position raises an uncomfortable implication: every one of its arguments could have been pressed in favor of an enquiry beyond what *Taylor* allows when a jury conviction follows nongeneric instructions, and each is therefore as much a menace to *Taylor* as a justification for an expansive approach to showing whether a guilty plea admitted the generic crime. If the transcript of a jury trial showed testimony about a building break, one could say that the jury's verdict rested on a finding to that effect. If the trial record showed no evidence of felonious entrance to anything but a building or structure, the odds that the offense actually committed was generic burglary would be a turf accountant's dream. And, again, if it were significant that vagaries of abbreviated plea records could limit the application of the ACCA, the significance would be no less when the disputed, predicate conviction followed a jury trial and the stenographic notes of the charge had been thrown away.

The Government's position thus amounts to a call to ease away from the *Taylor* conclusion, that respect for congressional intent and avoidance of collateral trials require that evidence of generic conviction be confined to records of the convicting court approaching the certainty of the record of conviction in a generic crime State. But that limitation was the heart of the decision, and we cannot have *Taylor* and the Government's position both.

There is not, however, any sufficient justification for upsetting precedent here. We are, after all, dealing with an issue of statutory interpretation, see, *e. g.*, *Taylor*, 495 U. S., at 602, and the claim to adhere to case law is generally powerful once a decision has settled statutory meaning, see *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 172–173 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done"). In this instance, time has enhanced even the usual precedential force, nearly 15 years having passed since *Taylor* came down, without any action by Congress to modify the statute as subject to our understanding that it allowed only a restricted look beyond the record of conviction under a nongeneric statute.[4]

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[4] Like the Government, the dissent would allow district courts to examine a wider range of documents than we approve today, and its proposal is no more consistent with *Taylor* than the Government's. *Taylor* is clear that any enquiry beyond statute and charging document must be narrowly restricted to implement the object of the statute and avoid evidentiary disputes. In the case before it, the Court drew the line after allowing courts to review documents showing "that the jury necessarily had to find an entry of a building to convict." 495 U. S., at 602; see also *ibid.* (permitting a sentencing court to look beyond the state statute "in a narrow range of cases where a jury was actually required to find all the elements of generic burglary"). As we say in the text, there are certainly jury trials with record documents like those at issue here, never introduced at trial

## III

Developments in the law since *Taylor*, and since the First Circuit's decision in *Harris*, provide a further reason to adhere to the demanding requirement that any sentence under the ACCA rest on a showing that a prior conviction "necessarily" involved (and a prior plea necessarily admitted) facts equating to generic burglary. The *Taylor* Court, indeed, was prescient in its discussion of problems that would follow from allowing a broader evidentiary enquiry. "If the sentencing court were to conclude, from its own review of the record, that the defendant [who was convicted under a non-generic burglary statute] actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial?" 495 U. S., at 601. The Court thus anticipated the very rule later imposed for the sake of preserving the Sixth Amendment right, that any fact other than a prior conviction sufficient to raise the limit of the possible federal sentence must be found by a jury, in the absence of any waiver of rights by the defendant. *Jones* v. *United States*, 526 U. S. 227, 243, n. 6 (1999); see also *Apprendi* v. *New Jersey*, 530 U. S. 466, 490 (2000).

The Government dismisses the relevance of the *Jones-Apprendi* implementation of the jury right here by describ-

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but "uncontradicted," *post*, at 31 (opinion of O'CONNOR, J.), and "internally consistent," *ibid.*, with the evidence that came in. The dissent would presumably permit examination of such documents, but *Taylor* assuredly does not.

The only way to reconcile the dissent's approach with *Taylor* is to say that in *Taylor* the prior convictions followed jury verdicts while in this case each prior conviction grew out of a guilty plea. See *post*, at 36 ("*Taylor* itself set no rule for guilty pleas"). But *Taylor* has no suggestion that its reasoning would not apply in plea cases, and its discussion of the practical difficulties specifically referred to prior guilty pleas. 495 U. S., at 601. Moreover, as we have noted, see *supra*, at 19, and as the dissent nowhere disputes, the ACCA provides no support for such a distinction. We decline to create a distinction that Congress evidently had no desire to draw, that *Taylor* did not envision, and that we would be hard pressed to explain.

ing the determination necessary to apply the ACCA as "involv[ing] only an assessment of what the state court itself already has been 'required to find' in order to find the defendant guilty." Brief for United States 38 (quoting *Taylor*, *supra*, at 602). But it is not that simple. The problem is that "what the state court . . . has been 'required to find'" is debatable. In a nongeneric State, the fact necessary to show a generic crime is not established by the record of conviction as it would be in a generic State when a judicial finding of a disputed prior conviction is made on the authority of *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998). The state statute requires no finding of generic burglary, and without a charging document that narrows the charge to generic limits, the only certainty of a generic finding lies in jury instructions, or bench-trial findings and rulings, or (in a pleaded case) in the defendant's own admissions or accepted findings of fact confirming the factual basis for a valid plea. In this particular pleaded case, the record is silent on the generic element, there being no plea agreement or recorded colloquy in which Shepard admitted the generic fact.

Instead, the sentencing judge considering the ACCA enhancement would (on the Government's view) make a disputed finding of fact about what the defendant and state judge must have understood as the factual basis of the prior plea, and the dispute raises the concern underlying *Jones* and *Apprendi:* the Sixth and Fourteenth Amendments guarantee a jury standing between a defendant and the power of the State, and they guarantee a jury's finding of any disputed fact essential to increase the ceiling of a potential sentence. While the disputed fact here can be described as a fact about a prior conviction, it is too far removed from the conclusive significance of a prior judicial record, and too much like the findings subject to *Jones* and *Apprendi*, to say that *Almendarez-Torres* clearly authorizes a judge to resolve the dispute. The rule of reading statutes to avoid serious risks of unconstitutionality, see *Jones*, *supra*, at 239, therefore

counsels us to limit the scope of judicial factfinding on the disputed generic character of a prior plea, just as *Taylor* constrained judicial findings about the generic implication of a jury's verdict.[5]

IV

We hold that enquiry under the ACCA to determine whether a plea of guilty to burglary defined by a nongeneric statute necessarily admitted elements of the generic offense is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

*It is so ordered.*

THE CHIEF JUSTICE took no part in the decision of this case.

JUSTICE THOMAS, concurring in part and concurring in the judgment.

*Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), and its progeny prohibit judges from "mak[ing] a finding that raises [a defendant's] sentence beyond the sentence that could have

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[5]The dissent charges that our decision may portend the extension of *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), to proof of prior convictions, a move which (if it should occur) "surely will do no favors for future defendants in Shepard's shoes." *Post*, at 38. According to the dissent, the Government, bearing the burden of proving the defendant's prior burglaries to the jury, would then have the right to introduce evidence of those burglaries at trial, and so threaten severe prejudice to the defendant. It is up to the future to show whether the dissent is good prophesy, but the dissent's apprehensiveness can be resolved right now, for if the dissent turns out to be right that *Apprendi* will reach further, any defendant who feels that the risk of prejudice is too high can waive the right to have a jury decide questions about his prior convictions.

lawfully been imposed by reference to facts found by the jury or admitted by the defendant." *United States* v. *Booker*, 543 U. S. 220, 317–318 (2005) (THOMAS, J., dissenting in part). Yet that is what the Armed Career Criminal Act, 18 U. S. C. § 924(e) (2000 ed. and Supp. II), permits in this case. Petitioner Reginald Shepard pleaded guilty to being a felon in possession of a firearm, in violation of 18 U. S. C. § 922(g)(1), which exposed him to a maximum sentence of 10 years under § 924(a)(2) and a Federal Sentencing Guidelines range of 30-to-37 months. However, § 924(e)(1) (2000 ed., Supp. II) mandated a minimum 15-year sentence if Shepard had three previous convictions for "a violent felony or a serious drug offense." Shepard has never conceded that his prior state-court convictions qualify as violent felonies or serious drug offenses under § 924(e). Even so, the Court of Appeals resolved this contested factual matter by ordering the District Court to impose the enhancement on remand.

The constitutional infirmity of § 924(e)(1) as applied to Shepard makes today's decision an unnecessary exercise. Nevertheless, the plurality today refines the rule of *Taylor* v. *United States*, 495 U. S. 575 (1990), and further instructs district courts on the evidence they may consider in determining whether prior state convictions are § 924(e) predicate offenses. *Taylor* and today's decision thus explain to lower courts how to conduct factfinding that is, according to the logic of this Court's intervening precedents, unconstitutional in this very case. The need for further refinement of *Taylor* endures because this Court has not yet reconsidered *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998), which draws an exception to the *Apprendi* line of cases for judicial factfinding that concerns a defendant's prior convictions. See *Apprendi*, *supra*, at 487–490.

*Almendarez-Torres*, like *Taylor*, has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided. See 523 U. S., at 248–249

(SCALIA, J., joined by STEVENS, SOUTER, and GINSBURG, JJ., dissenting); *Apprendi*, *supra*, at 520–521 (THOMAS, J., concurring). The parties do not request it here, but in an appropriate case, this Court should consider *Almendarez-Torres*' continuing viability. Innumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres*, despite the fundamental "imperative that the Court maintain absolute fidelity to the protections of the individual afforded by the notice, trial by jury, and beyond-a-reasonable-doubt requirements." *Harris* v. *United States*, 536 U. S. 545, 581–582 (2002) (THOMAS, J., dissenting).

In my view, broadening the evidence judges may consider when finding facts under *Taylor*—by permitting sentencing courts to look beyond charging papers, jury instructions, and plea agreements to an assortment of other documents such as complaint applications and police reports—would not give rise to constitutional doubt, as the plurality believes. See *ante*, at 24–26. It would give rise to constitutional error, no less than does the limited factfinding that *Taylor*'s rule permits. For this reason, as well as those set forth in Parts I, II, and IV of the Court's opinion, the Court correctly declines to broaden the scope of the evidence judges may consider under *Taylor*. But because the factfinding procedure the Court rejects gives rise to constitutional error, not doubt, I cannot join Part III of the opinion.

JUSTICE O'CONNOR, with whom JUSTICE KENNEDY and JUSTICE BREYER join, dissenting.

The Court today adopts a rule that is not compelled by statute or by this Court's precedent, that makes little sense as a practical matter, and that will substantially frustrate Congress' scheme for punishing repeat violent offenders who violate federal gun laws. The Court is willing to acknowledge that petitioner's prior state burglary convictions occurred, and that they involved unpermitted entries with

intent to commit felonies. But the Court refuses to accept one additional, commonsense inference, based on substantial documentation and without any evidence to the contrary: that petitioner was punished for his entries into *buildings*.

Petitioner, Reginald Shepard, has never actually denied that the prior crimes at issue were burglaries of buildings. Nor has he denied that, in pleading guilty to those crimes, he understood himself to be accepting punishment for burglarizing buildings. Instead, seeking to benefit from the unavailability of certain old court records and from a minor ambiguity in the prior crimes' charging documents, petitioner asks us to foreclose any resort to the clear and uncontradicted background documents that gave rise to and supported his earlier convictions.

The Court acquiesces in that wish and instructs the federal courts to ignore all but the narrowest evidence regarding an Armed Career Criminal Act defendant's prior guilty pleas. I respectfully dissent.

## I

The Armed Career Criminal Act (ACCA) mandates a 15-year minimum sentence for certain federal firearms violations where the defendant has three prior convictions for a "violent felony." 18 U. S. C. § 924(e). In defining violent felonies for this purpose, Congress has specified that the term includes any crime, punishable by more than one year's imprisonment, that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii). We held in *Taylor* v. *United States*, 495 U. S. 575 (1990), that the statute's use of the term "burglary" was meant to encompass only what we described as "generic" burglary, a crime with three elements: (1) "unlawful or unprivileged entry into, or remaining in," (2) "a building or structure," (3) "with intent to commit a crime." *Id.*, at 598–599.

That left the problem of how to determine whether a defendant's past conviction qualified as a conviction for generic burglary. The most formalistic approach would have been to find the ACCA requirement satisfied only when the *statute* under which the defendant was convicted was one limited to "generic" burglary. But *Taylor* wisely declined to follow that course. The statutes which some States—like Massachusetts here, or Missouri in *Taylor*—use to prosecute generic burglary are overbroad for ACCA purposes: They are not limited to "generic" burglary, but also punish the nongeneric kind. Restricting the sentencing court's inquiry to the face of the statute would have frustrated the purposes of the ACCA by allowing some violent recidivists convicted of federal gun crimes to escape the ACCA's heightened punishment based solely on the fortuity of where they had committed their previous crimes.

Instead, *Taylor* adopted a more "pragmatic" approach. *Ante*, at 20 (majority opinion). Every statute punishes a certain set of criminalized actions; the problem with some burglary statutes, for purposes of the ACCA, is that they are overinclusive. But *Taylor* permitted a federal court to "go beyond the mere fact of conviction"—and to determine, by using other sources, whether the defendant's prior crime was in the *subset* of the statutory crime qualifying as generic burglary. For example, where a defendant's prior conviction occurred by jury trial, *Taylor* instructed the federal court to review "the indictment or information and jury instructions" from the earlier conviction, to see whether they had "required the jury to find all the elements of generic burglary in order to convict." 495 U. S., at 602.

As the Court recognizes, however, *Taylor*'s use of that one example did not purport to be exhaustive. See *ante*, at 20–21. See also *United States* v. *Harris*, 964 F. 2d 1234, 1236 (CA1 1992) (Breyer, C. J.). Rather, *Taylor* left room for courts to determine which other reliable and simple sources might aid in determining whether a defendant had in fact

been convicted of generic burglary. The Court identifies several such sources that a sentencing judge may consult under the ACCA: the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Ante*, at 16. I would expand that list to include *any* uncontradicted, internally consistent parts of the record from the earlier conviction. That would include the two sources the First Circuit relied upon in this case.

Shepard's four prior convictions all occurred by guilty pleas to charges under Massachusetts' two burglary statutes—statutes that punish "[w]hoever . . . breaks and enters a *building, ship, vessel or vehicle*, with intent to commit a felony." Mass. Gen. Laws Ann., ch. 266, § 16 (West 2000) (emphasis added); see also § 18. The criminal complaints used as charging documents for the convictions at issue did not specify that Shepard's offenses had involved a building, but instead closely copied the more inclusive language of the appropriate statute. If these complaints were the only evidence of the factual basis of Shepard's guilty pleas, then I would agree with the majority that there was no way to know whether those convictions were for burglarizing a building. But the Government did have additional evidence. For each of the convictions, the Government had both the applications by which the police had secured the criminal complaints and the police reports attached to those applications. Those documents decisively show that Shepard's illegal act in each prior conviction was the act of entering a building. Moreover, they make inescapable the conclusion that, at each guilty plea, Shepard *understood* himself to be admitting the crime of breaking into a building.

Consider, for instance, the first burglary conviction at issue. The complaint for that conviction alleged that, on May 6, 1989, Shepard "did break and enter in the night time the building, ship, vessel or vehicle, the property of Jerri Cothran, with intent to commit a felony therein" in violation

of § 16. 3 App. 5. The place of the offense was alleged as "30 Harlem St.," and the complaint contained a cross-reference to "CC#91–394783."

The majority would have us stop there. Since both the statute and the charging document name burglary of a "building, ship, vessel or vehicle," the majority concludes that there is no way to tell whether Massachusetts punished Shepard for transgressing its laws by burglarizing a building, or for doing so by burglarizing a vehicle, ship, or vessel. (Although the majority would also allow a look at Shepard's written plea agreement or a transcript of the plea proceedings, those items are no longer available in Shepard's case, since Massachusetts has apparently seen little need to preserve the miscellany of long-past convictions.)

I would look as well to additional portions of the record from that plea—the complaint application and police report. The complaint application lists the same statute, describes (in abbreviated form) the same offense, names the same victim and address, and contains the same reference number (though differently hyphenated) as the complaint itself. In addition, the application specifies as relevant "PROPERTY" (meaning "Goods stolen, what destroyed, etc.") a "Cellar Door." *Id.*, at 6. The police report (which also names the same victim, date, and place of offense, and contains the same reference number as the other two documents) gives substantially more detail about why Massachusetts began criminal proceedings against Shepard:

> "[R]esponded to [radio call] to 30 Harlem St. for B-E in progress. On arrival observed cellar door in rear had been broken down. Spoke to victim who stated that approx 3:00 a.m. she heard noises downstairs. She then observed suspect . . . in her pantry." *Id.*, at 7.

Three points need to be made about the relationship between the complaint (whose use the majority finds completely unobjectionable) and the application and police report

(which I would also consider). First, all of the documents concern the same crime. Second, the three documents are entirely consistent—nothing in any of them casts doubt on the veracity of the others. Finally, and most importantly, the common understanding behind all three documents was that, whatever the range of conduct punishable by the state statute, *this* defendant was being prosecuted for burglary *of a building*. See 348 F. 3d 308, 314 (CA1 2003) ("[T]here is a compelling inference that the plea was to the complaint and that the complaint embodied the events described in the application or police report in the case file").

There certainly is no evidence in the record contradicting that understanding. Notably, throughout these proceedings, Shepard has never denied that the four guilty pleas at issue involved breaking into buildings. Nor has he denied that his contemporaneous understanding of each plea was that, as a result of his admission, he would be punished for having broken into a building. During his federal sentencing hearings, Shepard did submit an affidavit about his prior convictions. But that affidavit carefully dances around the key issues of *what Shepard actually did* to run afoul of the law and *what he thought was the substance of his guilty plea*. Rather, the affidavit focuses on what the judge said to Shepard at the hearing and what Shepard said in response. Even in that regard, the affidavit is strangely ambiguous. In discussing the first conviction, for instance, the affidavit states that "the judge [who took the plea] did not read" the police report to Shepard, "and did not ask me whether or not the information contained in the . . . report was true." 1 App. 100. See also *ibid.* ("I did not admit the truth of the information contained in the . . . report as part of my plea and I have never admitted in court that the facts alleged in the reports are true"). The affidavit's statements about the other three prior convictions are similar.

Those statements could be taken as Shepard's denial that he was ever asked about (or ever admitted to) any of the

specific facts of his crime that happen to be mentioned in the police reports—facts like the date and place of the offense, whether he entered through a cellar door and proceeded to the pantry, and so on. But to believe that, we would have to presume that all four Massachusetts courts violated their duty under state law to assure themselves of the factual basis for Shepard's plea. In Massachusetts, "[a] defendant's choice to plead guilty will not alone support conviction; the defendant's guilt in fact must be established." *Commonwealth* v. *DelVerde*, 398 Mass. 288, 296, 496 N. E. 2d 1357, 1362 (1986). As a result, even if "the defendant admits to the crime in open court, . . . a court may not convict unless there are sufficient facts on the record to establish each element of the offense." *Id.*, at 297, 496 N. E. 2d, at 1363. See also *Commonwealth* v. *Colon*, 439 Mass. 519, 529, n. 13, 789 N. E. 2d 566, 573, n. 13 (2003) (guilty plea requires admission to the facts); 2 E. Blumenson, S. Fisher, & D. Kanstroom, Massachusetts Criminal Practice § 37.7B, p. 288 (1998) ("Usually this is accomplished by the recitation of either the grand jury minutes or police reports, but defendant's admissions during the plea, or trial evidence, can also support the factual basis" (footnote omitted)). Cf. *Commonwealth* v. *Forde*, 392 Mass. 453, 458, 466 N. E. 2d 510, 513 (1984) (conviction cannot be based on uncorroborated confession; rather, there must be some evidence that the crime was "real and not imaginary"). It is thus unlikely that Shepard really intended his affidavit as a statement that none of the various facts found in the police reports were ever admitted by him or discussed in his presence during his guilty pleas.

More likely, Shepard's attorney carefully phrased the affidavit so that it would admit of a different meaning: that the plea courts never asked, and Shepard never answered, the precise question: "Is what the police report says true?" But I fail to see how *that* is relevant, so long as Shepard understood that, in pleading guilty, he was agreeing to be punished

for the building break-in that was the subject of the entire proceeding.

There may be some scenarios in which—as the result of charge bargaining, for instance, or due to unexpected twists in an investigation—a defendant's guilty plea is premised on substantially different facts than those that were the basis for the original police investigation. In such a case, a defendant might well be confused about the practical meaning of his admission of guilt. Cf. *Taylor*, 495 U. S., at 601–602 ("[I]f a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary"). But there is no claim of such circumstances here: All signs are that everyone involved in each prior plea—from the judge, to the prosecutor, to the defense lawyer, to Shepard himself—understood each plea as Shepard's admission that he had broken into the building where the police caught him. Given each police report's never-superseded allegation that Shepard had burglarized a building, it strains credulity beyond the breaking point to assert that, in each case, Shepard was actually prosecuted for and pleaded guilty to burglarizing a ship or a car. The lower court was surely right to detect "an air of make-believe" about Shepard's case. 348 F. 3d, at 311.

The majority's rule, which forces the federal sentencing court to feign agnosticism about clearly knowable facts, cannot be squared with the ACCA's twin goals of incapacitating repeat violent offenders, and of doing so *consistently* notwithstanding the peculiarities of state law. Cf. *Taylor*, *supra*, at 582 ("'[I]n terms of fundamental fairness, the Act should ensure, to the extent that it is consistent with the prerogatives of the States in defining their own offenses, that the same type of conduct is punishable on the Federal level in all cases'" (quoting S. Rep. No. 98–190, p. 20 (1983))). The Court's overscrupulous regard for formality leads it not only

to an absurd result, but also to a result that Congress plainly hoped to avoid.

## II

The Court gives two principal reasons for today's ruling: adherence to the Court's decision in *Taylor*, and constitutional concerns about the defendant's right to a jury trial.

The first is hardly convincing. As noted above, *Taylor* itself set no rule for guilty pleas, and its list of sources for a sentencing court to consider was not intended to be exhaustive. *Supra*, at 30–31. The First Circuit's disposition of this case, therefore, was not in direct conflict with *Taylor*. Nor did it conflict with the spirit of *Taylor*. *Taylor* was in part about "[f]air[ness]" to defendants. 495 U. S., at 602. But there is nothing unfair (and a great deal that is positively just) about recognizing and acting upon plain and uncontradicted evidence that a defendant, in entering his prior plea, knew he was being prosecuted for and was pleading guilty to burglary of a building. *Taylor* also sought to avoid the impracticality of mini-sentencing-trials featuring opposing witnesses perusing lengthy transcripts of prior proceedings. *Id.*, at 601. But no such problem presents itself in this case: The Government proposed using only the small documentary record behind Shepard's pleas. Those documents relate to facts that Shepard does not dispute, and Shepard has not indicated any desire to submit counterevidence.

The issue most central to *Taylor* was the need to effectuate Congress' "categorical approach" to sentencing recidivist federal offenders—an approach which responds to the reality of a defendant's prior crimes, rather than the happenstance of how those crimes "were labeled by state law." *Id.*, at 589. But rather than promote this goal, the majority opinion today injects a new element of arbitrariness into the ACCA: A defendant's sentence will now depend not only on the peculiarities of the statutes particular States use to prosecute generic burglary, but also on whether those States' record retention policies happen to preserve the musty "written

plea agreement[s]" and recordings of "plea colloqu[ies]" ancillary to long-past convictions. *Ante*, at 16. In other words, with respect to this most critical issue, the majority's rule is not consistent with *Taylor* at all.

That is why I strongly suspect that the driving force behind today's decision is not *Taylor* itself, but rather "[d]evelopments in the law since *Taylor*." *Ante*, at 24 (plurality opinion). A majority of the Court defends its rule as necessary to avoid a result that might otherwise be unconstitutional under *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), and related cases. *Ante*, at 24–26 (plurality opinion); *ante*, at 27–28 (THOMAS, J., concurring in part and concurring in judgment). I have criticized that line of cases from the beginning, and I need not repeat my reasoning here. See *Apprendi*, *supra*, at 523 (dissenting opinion); *Ring* v. *Arizona*, 536 U. S. 584, 619 (2002) (dissenting opinion); *Blakely* v. *Washington*, 542 U. S. 296, 344–345 (2004) (dissenting opinion). See also *Jones* v. *United States*, 526 U. S. 227, 254 (1999) (KENNEDY, J., dissenting); *Blakely*, *supra*, at 340–344 (BREYER, J., dissenting); *United States* v. *Booker*, 543 U. S. 220, 327–331 (2005) (BREYER, J., dissenting). It is a battle I have lost.

But it is one thing for the majority to apply its *Apprendi* rule within that rule's own bounds, and quite another to extend the rule into new territory that *Apprendi* and succeeding cases had expressly and consistently disclaimed. Yet today's decision reads *Apprendi* to cast a shadow possibly implicating recidivism determinations, which until now had been safe from such formalism. See *Blakely*, *supra*, at 301 ("'*Other than the fact of a prior conviction*, any fact that increases the penalty of a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt'" (quoting *Apprendi*, *supra*, at 490; emphasis added)). See also *Booker*, *supra*, at 244 (opinion of the Court by STEVENS, J.) (similar).

Even in a post-*Apprendi* world, I cannot understand how today's case raises any reasonable constitutional concern.

To the contrary, this case presents especially good reasons for respecting Congress' long "tradition of treating recidivism as a sentencing factor" determined by the judge, *Almendarez-Torres* v. *United States*, 523 U. S. 224, 243 (1998), rather than as a substantive offense element determined by the jury. First, Shepard's prior convictions were themselves "established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones*, *supra*, at 249. Second, as with most recidivism determinations, see *Almendarez-Torres*, *supra*, at 235, the burglary determination in Shepard's case concerned an extremely narrow issue, with the relevant facts not seriously contested. See *supra*, at 33–35 (discussing shortcomings of Shepard's affidavit). Finally, today's hint at extending the *Apprendi* rule to the issue of ACCA prior crimes surely will do no favors for future defendants in Shepard's shoes. When ACCA defendants in the future go to trial rather than plead guilty, the majority's ruling in effect invites the Government, in prosecuting the federal gun charge, also "to prove to the jury" the defendant's prior burglaries. *Almendarez-Torres*, 523 U. S., at 234–235. "[T]he introduction of evidence of a defendant's prior crimes risks significant prejudice," *id.*, at 235, and that prejudice is likely to be especially strong in ACCA cases, where the relevant prior crimes are, by definition, "violent," 18 U. S. C. § 924(e). In short, whatever the merits of the *Apprendi* doctrine, that doctrine does not currently bear on, and should not be extended to bear on, determinations of a defendant's past crimes, like the ACCA predicates at issue in Shepard's case. The plurality's concern about constitutional doubt, *ante*, at 24–26, and JUSTICE THOMAS' concern about constitutional error, *ante*, at 27–28, are therefore misplaced.

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For the reasons explained above, I would find that the First Circuit properly established the applicability of the

ACCA sentence by looking to the complaint applications and police reports from the prior convictions. Because the Court concludes otherwise, I respectfully dissent.

Syllabus

# BALLARD ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 03–184. Argued December 7, 2004—Decided March 7, 2005*

The Tax Court's Chief Judge appoints auxiliary officers, called special trial judges, to hear certain cases, 26 U. S. C. § 7443A(a), (b), but ultimate decision, when tax deficiencies exceed $50,000, is reserved for the court itself, § 7443A(b)(5), (c). Tax Court Rule 183(b) governs the two-tiered proceedings in which a special trial judge hears the case, but the court renders the final decision. Rule 183(b) directs that, after trial and submission of briefs, the special trial judge "shall submit a report, including findings of fact and opinion, to the Chief Judge, [who] will assign the case to a Judge . . . of the Court." In acting on the report, the assigned Tax Court judge must give "[d]ue regard . . . to the circumstance that the [s]pecial [t]rial [j]udge had the opportunity to evaluate the credibility of the witnesses," must "presum[e] to be correct" factfindings contained in the report, and "may adopt the [s]pecial [t]rial [j]udge's report or may modify it or may reject it in whole or in part." Rule 183(c). Until 1983, such special trial judge reports were made public and included in the record on appeal. Coincident with a rule revision that year, the Tax Court stopped disclosing those reports to the public and has excluded them from the appellate record. Further, Tax Court judges do not disclose whether the final decision "modi[fies]" or "reject[s]" the special trial judge's initial report. Instead, the final decision invariably begins with a stock statement that the Tax Court judge "agrees with and adopts the opinion of the [s]pecial [t]rial [j]udge." Whether and how the final decision deviates from the special trial judge's original report is never revealed.

Petitioners Claude Ballard, Burton Kanter, and another taxpayer received notices of deficiency from respondent Commissioner of Internal Revenue (Commissioner) charging them with failure to report certain payments on their individual tax returns and with tax fraud. They filed petitions for redetermination in the Tax Court, where the Chief Judge assigned the consolidated case to Special Trial Judge Couvillion.

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*Together with No. 03–1034, *Estate of Kanter, Deceased, et al.* v. *Commissioner of Internal Revenue*, on certiorari to the United States Court of Appeals for the Seventh Circuit.

After trial, Judge Couvillion submitted a Rule 183(b) report to the Chief Judge, who issued an order assigning the case to Tax Court Judge Dawson "for review [of that report] and, if approved, for adoption." Ultimately, Judge Dawson issued the Tax Court's decision, finding that the taxpayers had acted with intent to deceive the Commissioner, and holding them liable for underpaid taxes and substantial fraud penalties. That decision, consisting wholly of a document labeled "Opinion of the Special Trial Judge," declared: "The Court agrees with and adopts the opinion of the Special Trial Judge, which is set forth below."

Based on conversations between Kanter's attorney and two Tax Court judges, the taxpayers came to believe that the decision was *not* in fact a reproduction of Judge Couvillion's Rule 183(b) report. According to a declaration submitted by Kanter's attorney, Judge Couvillion had concluded that the taxpayers did not owe taxes with respect to some of the payments at issue and that the fraud penalty was not applicable. The taxpayers therefore filed motions seeking access to Judge Couvillion's initial report as submitted to the Chief Judge or, in the alternative, permission to place that report under seal in the appellate record. Denying the requested relief, the Tax Court stated: "Judge Dawson . . . and Special Trial Judge Couvillion agre[e] that . . . Judge Dawson adopted the findings of fact and opinion of . . . Judge Couvillion, . . . presumed [those] findings of fact . . . were correct, and . . . gave due regard" to Judge Couvillion's credibility findings. The order added that "any preliminary drafts" of the special trial judge's report were "not subject to production because they relate to [the court's] internal deliberative processes." On appeal, both the Eleventh Circuit in Ballard's case and the Seventh Circuit in Kanter's case rejected the taxpayers' objection to the absence of the special trial judge's Rule 183(b) report from the appellate record. Proceeding to the merits, both Courts of Appeals affirmed the Tax Court's final decision in principal part.

*Held:* The Tax Court may not exclude from the record on appeal Rule 183(b) reports submitted by special trial judges. No statute authorizes, and Rule 183's current text does not warrant, the concealment at issue. Pp. 53–65.

(a) Rule 183(c)'s promulgation history confirms the clear understanding, from the start, that deference is due the trial judge's factfindings under the "[d]ue regard" and "presumed to be correct" formulations. Under Rule 183's precursor, the Tax Court's review of the special trial judge's report was a transparent process. The report was served on the parties, who were authorized to file objections to it, and the regular Tax Court judge reviewed the report independently, on the basis of the record and the parties' objections. Parties were therefore equipped to

argue to an appellate court that the Tax Court failed to give the special trial judge's findings the required measure of respect. On adoption of the 1983 amendments, however, the Tax Court stopped acknowledging instances in which it rejected or modified special trial judge findings. Instead, it appears that the Tax Court inaugurated a novel practice whereby the special trial judge's report is treated essentially as an in-house draft to be worked over collaboratively by the regular Tax Court judge and the special trial judge. The regular Tax Court judge then issues a decision purporting to "agre[e] with and adop[t] the opinion of the Special Trial Judge."

Nowhere in the Tax Court's current Rules is this joint enterprise described or authorized. Notably, the Rules provide for only one special trial judge "opinion": Rule 183(b) instructs that the special trial judge's report, submitted to the Chief Judge *before* a regular Tax Court judge is assigned to the case, shall consist of findings of fact and opinion. It is the Rule 183(b) report, not some subsequently composed collaborative report, that Rule 183(c), tellingly captioned "Action on the Report," instructs the Tax Court judge to review and adopt, modify, or reject. It is difficult to comprehend how a Tax Court judge would give "[d]ue regard" to, and "presum[e] to be correct," an opinion he himself collaborated in producing.

The Tax Court, like all other decisionmaking tribunals, is obliged to follow its own Rules. See, *e. g.*, *Service* v. *Dulles*, 354 U. S. 363, 388. Although the Tax Court is not without leeway in interpreting its Rules, it is unreasonable to read into Rule 183 an unprovided-for collaborative process, and to interpret the formulations "due regard" and "presumed to be correct," to convey something other than what those same words meant prior to the 1983 rule changes. Pp. 53–59.

(b) The Tax Court's practice of not disclosing the special trial judge's original report, and of obscuring the Tax Court judge's mode of reviewing that report, impedes fully informed appellate review of the Tax Court's decision. In directing the regular judge to give "due regard" to the special trial judge's credibility determinations and to "presum[e] . . . correct" the special trial judge's factfindings, Rule 183(c) recognizes a well-founded, commonly accepted understanding: The officer who hears witnesses and sifts through evidence in the first instance will have a comprehensive view of the case that cannot be conveyed full strength by a paper record. Fraud cases, in particular, may involve critical credibility assessments, rendering the appraisals of the judge who presided at trial vital to the ultimate determination. In the present cases, for example, the Tax Court's decision repeatedly draws outcome-influencing conclusions regarding the credibility of Ballard,

Kanter, and other witnesses. Absent access to the special trial judge's Rule 183(b) report in this and similar cases, the appellate court will be at a loss to determine (1) whether the credibility and other findings made in that report were accorded "[d]ue regard" and were "presumed . . . correct" by the Tax Court judge, or (2) whether they were displaced without adherence to those standards.

The Tax Court's practice is extraordinary, for it is routine in federal judicial and administrative decisionmaking both to disclose a hearing officer's initial report, see, *e. g.*, 28 U. S. C. §636(b)(1)(C), and to make that report part of the record available to an appellate forum, see, *e. g.*, 5 U. S. C. §557(c). The Commissioner asserts a statutory analogy, however, 26 U. S. C. §7460(b), which instructs that when the full Tax Court reviews the decision of a single Tax Court judge, the initial one-judge decision "shall not be a part of the record." This Court rejects the Commissioner's endeavor to equate proceedings that differ markedly. Full Tax Court review is designed for resolution of legal issues. Review of that order is *de novo*. In contrast, findings of fact are key to special trial judge reports. Those findings, under the Tax Court's Rules, are not subject to *de novo* review. Instead, they are measured against "due regard" and "presumed correct" standards. Furthermore, all regular Tax Court members are equal in rank, each has an equal voice in the Tax Court's business, and the regular judge who issued the original decision is free to file a dissenting opinion recapitulating that judge's initial opinion. The special trial judge, who serves at the pleasure of the Tax Court, lacks the regular judges' independence and the prerogative to publish dissenting views.

Given this Court's holding that the Tax Court's practice is not described and authorized by that court's Rules, this Court need not reach, and expresses no opinion on, the taxpayers' further arguments based on due process and other statutory provisions. Should the Tax Court some day amend its Rules to adopt the idiosyncratic procedure here rejected, the changed character of the Tax Court judge's review of special trial judge reports would be subject to appellate review for consistency with the relevant federal statutes and due process. Pp. 59–65.

No. 03–184, 321 F. 3d 1037; No. 03–1034, 337 F. 3d 833, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SCALIA, KENNEDY, SOUTER, and BREYER, JJ., joined. KENNEDY, J., filed a concurring opinion, in which SCALIA, J., joined, *post*, p. 65. REHNQUIST, C. J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 68.

*Stephen M. Shapiro* argued the cause for petitioners in both cases. On the briefs in No. 03–184 were *Vester T. Hughes, Jr.*, *Robert E. Davis*, *David J. Schenck*, *Christopher D. Kratovil*, *Steven S. Brown*, *Royal B. Martin*, and *William G. Sullivan*. With *Mr. Shapiro* on the briefs in No. 03–1034 were *Richard H. Pildes*, *Peter J. Rubin*, *N. Jerold Cohen*, *Teresa Wynn Roseborough*, *Philip Allen Lacovara*, and *Randall G. Dick*.

*Deputy Solicitor General Hungar* argued the cause for respondent in both cases. With him on the brief were *Acting Solicitor General Clement*, *Assistant Attorney General O'Connor*, *Deputy Assistant Attorney General Morrison*, *Traci L. Lovitt*, *Kenneth L. Greene*, and *Steven W. Parks*.†

JUSTICE GINSBURG delivered the opinion of the Court.

These cases concern the Tax Court's employment of special trial judges, auxiliary officers appointed by the Chief Judge of the Tax Court to assist in the work of the court. See 26 U. S. C. § 7443A(a). Unlike Tax Court judges, who are appointed by the President for 15-year terms, see § 7443(b), (e), special trial judges have no fixed term of office, § 7443A(a). Any case before the Tax Court may be assigned to a special trial judge for hearing. Ultimate decision in cases involving tax deficiencies that exceed $50,000, however, is reserved for the Tax Court. § 7443A(c).

Tax Court Rule 183 governs the two-tiered proceedings in which a special trial judge hears the case, but the Tax Court itself renders the final decision. The Rule directs that, after

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†Briefs of *amici curiae* urging reversal in both cases were filed for the National Federation of Independent Business Legal Foundation by *H. Christopher Bartolomucci*; and for Senator David Pryor et al. by *Roderick M. Hills, Jr.*

*Scott L. Nelson*, *Alan B. Morrison*, and *Steven R. Shapiro* filed a brief for Public Citizen, Inc., et al. as *amici curiae* urging reversal in No. 03–1034.

*Leandra Lederman*, *pro se*, filed a brief as *amicus curiae*.

trial and submission of briefs, the special trial judge "shall submit a report, including findings of fact and opinion, to the Chief Judge, and the Chief Judge will assign the case to a Judge . . . of the Court." Tax Ct. Rule 183(b), 26 U. S. C. App., p. 1619. In acting on the report, the Tax Court judge to whom the case is assigned must give "[d]ue regard . . . to the circumstance that the [s]pecial [t]rial [j]udge had the opportunity to evaluate the credibility of the witnesses." Rule 183(c), *ibid.* Further, factfindings contained in the report "shall be presumed to be correct." *Ibid.* The final Tax Court decision "may adopt the [s]pecial [t]rial [j]udge's report or may modify it or may reject it in whole or in part." *Ibid.*

Until 1983, special trial judge reports, as submitted to the Chief Judge, were made public and were included in the record on appeal. A rule revision that year deleted the requirement that, upon submission of the special trial judge's report, "a copy . . . shall forthwith be served on each party." See Rule 183 note, 81 T. C. 1069–1070 (1984). Correspondingly, the revision deleted the prior provision giving parties an opportunity to set forth "exceptions" to the report. *Ibid.*[1] Coincident with those rule changes, the Tax Court significantly altered its practice in cases referred for trial, but not final decision, to special trial judges. Since the Jan-

[1] Unlike other judicial and administrative bodies, the Tax Court does not maintain a formal practice of publicly disclosing proposed amendments to its Rules. See *Estate of Kanter* v. *Commissioner*, 337 F. 3d 833, 877–878, n. 2 (CA7 2003) (Cudahy, J., concurring in part and dissenting in part) (describing the Tax Court's lack of a "formal documented procedure" for amending its Rules as "oddly out of sync with prevailing practices in other areas of the law"). Although the Tax Court solicits comments on proposed rule changes from the American Bar Association's Section on Taxation, see ABA Members Suggest Modifications to Proposed Amendments of Tax Court Rules, 97 Tax Notes Today, p. 167–25 (Aug. 28, 1997), the court apparently does not publish its proposals to, or accept comments from, the general public.

uary 16, 1984 effective date of the rule revision, the post-trial report submitted to the Chief Judge, then transmitted to the Tax Court judge assigned to make the final decision, has been both withheld from the public and excluded from the record on appeal. Further, since that time, Tax Court judges have refrained from disclosing, in any case, whether the final decision in fact "modi[fies]" or "reject[s] [the special trial judge's initial report] in whole or in part." Cf. Rule 183(c), 26 U. S. C. App., p. 1619. Instead, the final decision invariably begins with a stock statement that the Tax Court judge "agrees with and adopts the opinion of the [s]pecial [t]rial [j]udge." See, *e. g.*, *Investment Research Assoc., Ltd.* v. *Commissioner*, 78 TCM 951, 963 (1999), ¶ 99,407 RIA Memo TC, pp. 2562–2563. Whether and how the opinion thus adopted deviates from the special trial judge's original report is never made public.

Petitioners are taxpayers who were unsuccessful in the Tax Court and on appeal. They object to the concealment of the special trial judge's initial report and, in particular, exclusion of the report from the record on appeal. They urge that, under the Tax Court's current practice, the parties and the Court of Appeals lack essential information: One cannot tell whether, as Rule 183(c) requires, the final decision reflects "[d]ue regard" for the special trial judge's "opportunity to evaluate the credibility of [the] witnesses," and presumes the correctness of that judge's initial factfindings. We agree that no statute authorizes, and the current text of Rule 183 does not warrant, the concealment at issue. We so hold, mindful that it is routine in federal judicial and administrative decisionmaking both to disclose the initial report of a hearing officer, and to make that report part of the record available to an appellate forum. A departure of the bold character practiced by the Tax Court—the creation and attribution solely to the special trial judge of a superseding report composed in unrevealed collaboration with a regular

Tax Court judge—demands, at the very least, full and fair statement in the Tax Court's own Rules.[2]

## I

After repeated Internal Revenue Service audits spanning several years, taxpayers Claude Ballard, Burton W. Kanter, and Robert Lisle received multiple notices of deficiency from the Commissioner of Internal Revenue (Commissioner).[3] The Commissioner charged that during the 1970's and 1980's, Ballard and Lisle, real estate executives at the Prudential Life Insurance Company of America (Prudential), had an arrangement with Kanter, a tax lawyer and business entrepreneur, under which people seeking to do business with Prudential made payments to corporations controlled by

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[2] The dissent observes that the parties did not discretely refer to the ground on which our decision rests. See *post*, at 68, n. 1 (opinion of REHNQUIST, C. J.); Brief for Petitioner Kanter (i) (asking whether Tax Court Rule 183 requires Tax Court judges to uphold findings made by special trial judges unless "clearly erroneous" (internal quotation marks omitted)). The meaning of Rule 183, however, is a question anterior to all other questions the parties raised, and the requirements of the Rule were indeed aired in the taxpayers' briefs. See *id.*, at 34–39; Reply Brief for Petitioner Ballard 2–3, 8–10; Reply Brief for Petitioner Kanter 3–8. Under the circumstances, we think it evident that our disposition is in entire accord with "our own Rule." Compare *post*, at 68, n. 1 (opinion of REHNQUIST, C. J.), with this Court's Rule 14.1(a) ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein."); and *R. A. V.* v. *St. Paul*, 505 U. S. 377, 381, n. 3 (1992). See generally R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 414 (8th ed. 2002) (observing that "[q]uestions not explicitly mentioned but essential to analysis of the decisions below or to the correct disposition of the other issues have been treated as subsidiary issues fairly comprised by the question presented" (internal quotation marks omitted)).

[3] Petitioners here are Ballard; his wife, who was included in the notices of deficiency because she filed joint returns with her husband; Kanter's estate; Kanter's executor; and Kanter's wife. Brief for Petitioner Ballard (ii); Brief for Petitioner Kanter (ii). Lisle's estate is not a petitioner before this Court. See *infra*, at 52, and n. 8. For convenience, this opinion will refer to the petitioners simply as "Ballard" and "Kanter."

Kanter. Those payments, the Commissioner alleged, were then distributed to Kanter, Ballard, and Lisle, or to entities they controlled. Ballard, Kanter, and Lisle did not report the payments on their individual tax returns. See *Investment Research Assoc.*, 78 TCM, at 1058, ¶ 99,407 RIA Memo TC, pp. 2672–2673; *Ballard* v. *Commissioner*, 321 F. 3d 1037, 1038–1039 (CA11 2003); Brief for Petitioner Ballard 3–4; Brief for Petitioner Kanter 11. After the initial deficiency notices, the Commissioner, in 1994, additionally charged that the taxpayers' actions were fraudulent. See *Investment Research Assoc.*, 78 TCM, at 966, ¶ 99,407 RIA Memo TC, p. 2693. As to each asserted deficiency, Ballard, Kanter, and Lisle filed petitions for redetermination in the Tax Court. See *Ballard*, 321 F. 3d, at 1040.

The Tax Court is composed of 19 regular judges appointed by the President for 15-year terms, and several special trial judges appointed, from time to time, by the Tax Court's Chief Judge. See 26 U. S. C. §§ 7443(a)–(b), (e), 7443A(a).[4] The statute governing the appointment and competence of special trial judges, § 7443A,[5] prescribes no term of office for them, but sets their salaries at 90% of the salary paid to regular judges of the Tax Court, see § 7443A(d). The Tax Court may authorize special trial judges to hear and render final decisions in declaratory judgment proceedings, "small tax cases," and levy and lien proceedings. See § 7443A(b)(1)–(4), (c); Tax Ct. Rule 182, 26 U. S. C. App., p. 1619; Brief for Respondent 3. If the amount of the taxes at issue exceeds $50,000, a special trial judge may be as-

[4] Special trial judges were called "commissioners" when the office was created in 1943. The Tax Court changed the title to "special trial judge" in 1979. See Tax Ct. Rule 182 note, 71 T. C. 1215 (1979); Brief for Petitioner Kanter 6.

[5] Section 7443A was amended and renumbered in 1998, some years after the 1994 trial in these cases. See Pub. L. 105–206, § 3401(c), 112 Stat. 749. The alterations did not change the statute's text in any relevant respect. This opinion refers to the current version of the statute.

signed to preside over the trial and issue a report containing recommended factfindings and conclusions as to the taxpayers' liability, but decisional authority is reserved for the Tax Court. See § 7443A(b)(5), (c); *Freytag* v. *Commissioner*, 501 U. S. 868, 881–882 (1991) (noting that special trial judges "take testimony, conduct trials, [and] rule on the admissibility of evidence," but "lack authority to enter a final decision" in certain cases). Tax Court Rule 183 governs the Tax Court's review of the special trial judge's findings and opinion. See *supra*, at 44–45.

After Ballard, Kanter, and Lisle sought review in the Tax Court, the Chief Judge assigned the consolidated case to Special Trial Judge D. Irvin Couvillion for trial. Judge Couvillion presided over a five-week trial during the summer of 1994, and the parties' briefing was completed in May 1995. App. 7; see also *Ballard*, 321 F. 3d, at 1040. The post-trial proceedings in the case are not fully memorialized in either the Tax Court's docket records or its published orders, but certain salient events can be traced. On or before September 2, 1998, Judge Couvillion submitted to the Chief Judge a report containing his findings of fact and opinion, "as required by [Tax Court] Rule 183(b)." Order of Dec. 15, 1999, in No. 43966–85 etc. (TC), App. to Kanter Pet. for Cert. 113a–114a. On September 2, 1998, the Chief Judge assigned the case to Tax Court Judge Howard A. Dawson, Jr., "for review [of the special trial judge's report] and, if approved, for adoption." *Id.*, at 114a.[6] Fifteen months later, on December 15, 1999, the Chief Judge "reassigned" the case "from [Judge] Couvillion to [Judge] Dawson." *Id.*,

[6] Judge Dawson is a retired Tax Court judge who served two terms, from 1962 until 1985, as a regular member of the court. He was recalled to judicial duties by the Chief Judge of the Tax Court in 1990. See 26 U. S. C. § 7447(c). Recalled judges serve "for any period . . . specified by the chief judge." *Ibid.* Their salary, unlike that of special trial judges, see *supra*, at 48, is equal to that of Tax Court judges.

at 113a. That same day, Judge Dawson issued the decision of the Tax Court.

Judge Dawson found that Ballard, Kanter, and Lisle had acted with intent to deceive the Commissioner, and held them liable for underpaid taxes and substantial fraud penalties. See, *e. g.*, *Investment Research Assoc.*, 78 TCM, at 1071, 1075, 1085, ¶ 99,407 RIA Memo TC, pp. 2689, 2692–2693, 2705–2706. In so ruling, Judge Dawson purported to adopt the findings contained in the report submitted by Judge Couvillion: "The Court agrees with and adopts the opinion of the Special Trial Judge, which is set forth below." *Id.*, at 963, ¶ 99,407 RIA Memo TC, pp. 2562–2563. Judge Dawson's decision consists in its entirety of a document, over 600 pages in length, labeled "Opinion of the Special Trial Judge." *Ibid.*

The taxpayers came to believe that the document titled "Opinion of the Special Trial Judge" was *not* in fact a reproduction of Judge Couvillion's Rule 183(b) report. A declaration, dated August 21, 2000, submitted by Kanter's attorney, Randall G. Dick, accounts for this belief. Dick attested to conversations with two Tax Court judges regarding the Tax Court's decision. According to the declaration, the judges told Dick that in the Rule 183(b) report submitted to the Chief Judge, Judge Couvillion had concluded that Ballard, Kanter, and Lisle did not owe taxes with respect to payments made by certain individuals seeking to do business with Prudential, and that the fraud penalty was not applicable. App. to Ballard Pet. for Cert. 308a–309a, ¶ 4. Attorney Dick's declaration further stated:

> "In my conversations with the judges of the Tax Court, I was told the following: That substantial sections of the opinion were not written by Judge Couvillion, and that those sections containing findings related to the credibility of witnesses and findings related to fraud were wholly contrary to the findings made by Judge Couvillion in his report. The changes to Judge Couvillion's

findings relating to credibility and fraud were made by Judge Dawson." *Id.*, at 309a, ¶ 5.

Concerned that Judge Dawson had modified or rejected special trial judge findings tending in their favor, see Tax Ct. Rule 183(c), the taxpayers filed three successive motions in the Tax Court; each motion sought access to the report Special Trial Judge Couvillion had submitted to the Chief Judge or, in the alternative, permission to place the special trial judge's report under seal in the record on appeal. See Order of Aug. 30, 2000, App. to Kanter Pet. for Cert. 99a–101a; Motion of May 25, 2000, *id.*, at 105a. The Tax Court denied the motions. See Order of Aug. 30, 2000, *id.*, at 100a–101a, 103a. In response to the taxpayers' third motion, filed in August 2000, the Tax Court elaborated: "Judge Dawson states and Special Trial Judge Couvillion agrees, that, after a meticulous and time-consuming review of the complex record in these cases, Judge Dawson adopted the findings of fact and opinion of Special Trial Judge Couvillion, . . . Judge Dawson presumed the findings of fact recommended by Special Trial Judge Couvillion were correct, and . . . Judge Dawson gave due regard" to Judge Couvillion's credibility findings. *Id.*, at 102a. To the extent that the taxpayers sought "any preliminary drafts" of the special trial judge's report, the Tax Court added, such documents are "not subject to production because they relate to the internal deliberative processes of the Court." *Id.*, at 101a (quoting Order of Apr. 26, 2000, *id.*, at 109a).

Appeals from Tax Court decisions are taken to the court of appeals for the circuit in which the taxpayer resides. 26 U. S. C. § 7482(b)(1)(A). Ballard therefore appealed to the Eleventh Circuit, Kanter to the Seventh Circuit, and Lisle to the Fifth Circuit. All three Courts of Appeals accepted the Commissioner's argument that the special trial judge's signature on the Tax Court's final decision rendered that decision in fact Special Trial Judge Couvillion's report. *Estate of Kanter* v. *Commissioner*, 337 F. 3d 833, 840–841 (CA7 2003);

*Ballard*, 321 F. 3d, at 1042; accord *Estate of Lisle* v. *Commissioner*, 341 F. 3d 364, 384 (CA5 2003) (adopting the reasoning of the Seventh and Eleventh Circuits without elaboration). The appeals courts further agreed with the Commissioner that the special trial judge's original report, submitted to the Chief Judge pursuant to Rule 183(b), qualified as a confidential document, shielded as part of the Tax Court's internal deliberative process. See *Kanter*, 337 F. 3d, at 841–844; *Ballard*, 321 F. 3d, at 1042–1043; accord *Estate of Lisle*, 341 F. 3d, at 384.

Having rejected the taxpayers' objection to the absence of the special trial judge's Rule 183(b) report from the record on appeal, the Seventh and Eleventh Circuits proceeded to the merits of the Tax Court's final decision and affirmed that decision in principal part. See *Kanter*, 337 F. 3d, at 873–874; *Ballard*, 321 F. 3d, at 1044.[7] The Fifth Circuit's judgment, which is not before this Court, reversed the fraud penalties assessed against Lisle for evidentiary insufficiency but upheld the Tax Court's determination of tax deficiencies for certain years. See *Estate of Lisle*, 341 F. 3d, at 384–385.[8] Seventh Circuit Judge Cudahy dissented on the issue of the special trial judge's initial report, maintaining that intelligent review of the Tax Court's decision required inclusion of that report in the record on appeal. See *Kanter*, 337 F. 3d, at 874, 884–888.

We granted certiorari, 541 U. S. 1009 (2004), to resolve the question whether the Tax Court may exclude from the record on appeal Rule 183(b) reports submitted by special trial judges. We now reverse the decisions of the Seventh and Eleventh Circuits upholding the exclusion.

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[7] Finding one of Kanter's deductions legitimate, the Seventh Circuit reversed the Tax Court's ruling on that issue. See *Kanter*, 337 F. 3d, at 854–857.

[8] Lisle's estate did not seek this Court's review of the adverse portions of the Fifth Circuit's decision.

## II

Central to these cases is Tax Court Rule 183, which delineates the procedural framework and substantive standards governing Tax Court review of special trial judge findings. Rule 183(b), captioned "Special Trial Judge's Report," provides that after the trial of a case and submission of the parties' briefs, "the Special Trial Judge shall submit a report, including findings of fact and opinion, to the Chief Judge, and the Chief Judge will assign the case to a Judge . . . of the Court." 26 U. S. C. App., p. 1619.[9] Rule 183(c), directed to the Tax Court judge to whom the case is assigned for final decision, reads:

> "Action on the Report: The Judge to whom . . . the case is assigned may adopt the Special Trial Judge's report or may modify it or may reject it in whole or in part, or may direct the filing of additional briefs or may receive further evidence or may direct oral argument, or may recommit the report with instructions. Due regard shall be given to the circumstance that the Special Trial Judge had the opportunity to evaluate the credibility of witnesses, and the findings of fact recommended by the Special Trial Judge shall be presumed to be correct."

The Tax Court judge assigned to take action on the special trial judge's report in these cases invoked none of the means Rule 183(c) provides to supplement the record. He did not "direct the filing of additional briefs[,] receive further evidence or . . . direct oral argument." See *ibid.* Nor does the record show, or the Commissioner contend, see Brief for Respondent 14–15, that the Tax Court judge "recommit[ed]

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[9] Rule 183 has been amended since these cases were before the Tax Court, but the substantive provisions of the Rule have not been altered in any relevant respect. Compare Tax Ct. Rule 183, 26 U. S. C. App., p. 1483 (1994 ed.), with Tax Ct. Rule 183 (interim amendment), 26 U. S. C. App., p. 1670 (2000 ed.). Citations in this opinion are to the version of the Rule reprinted in the 2000 edition of the United States Code.

the [special trial judge's] report with instructions." Rule 183(c).[10] From all that appears on the record, then, Judge Dawson's review of the factfindings contained in Judge Couvillion's report rested on the Rule 183(b) report itself, the trial transcript, and the other documents on file. Rule 183(c) guides the appraisal of those filed materials.

Rule 183(c)'s origin confirms the clear understanding, from the start, that deference is due to factfindings made by the trial judge. Commenting in 1973 on then newly adopted Rule 182(d), the precursor to Rule 183(c), the Tax Court observed that the Rule was modeled on Rule 147(b) of the former Court of Claims. Tax Ct. Rule 182 note, 60 T. C. 1150 (Tax Court review procedures were to be "comparable" to those used in the Court of Claims). Rule 182(d)'s "[d]ue

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[10] The record does contain an order stating in its entirety:

"For cause, it is ORDERED: That these cases are reassigned from Special Trial Judge D. Irvin Couvillion to Judge Howard A. Dawson, Jr., for disposition.

"After the Special Trial Judge submitted a report, as required by Rule 183(b), Tax Court Rules of Practice and Procedure, these cases were referred to Judge Dawson on September 2, 1998, for review and, if approved, for adoption.

. . . . .

"Dated: Washington, D. C. December 15, 1999." App. to Kanter Pet. for Cert. 113a–114a.

One might speculate, from the reference to a "reassign[ment]," that at some point between September 1998 and December 1999, Judge Dawson "recommitted" the report to Judge Couvillion, who subsequently submitted a revised report to the Chief Judge who, in turn, referred that report to Judge Dawson. The Commissioner does not urge such an interpretation of the December 15, 1999 order, however, and it is, in any event, implausible. The Tax Court's docket reveals no action taken between the initial assignment and the enigmatic reassignment. Had Judge Dawson turned back the report after first receiving it, an order recommitting the case to Judge Couvillion "with instructions," Rule 183(c), should have memorialized that action. Moreover, Judge Dawson rendered the final decision of the Tax Court on the same day the case was "reassigned" to him. Had he faced a recast Rule 183(b) report, it is doubtful that he could have absorbed and acted upon it so swiftly.

regard" and "presumed to be correct" formulations were taken directly from that earlier Rule,[11] which the Court of Claims interpreted to require respectful attention to the trial judge's findings of fact. See *Hebah* v. *United States*, 456 F. 2d 696, 698 (Ct. Cl. 1972) *(per curiam)* (challenger must make "a strong affirmative showing" to overcome the presumption of correctness that attaches to trial judge findings). The Tax Court's acknowledgment of Court of Claims Rule 147(b) as the model for its own Rule, indeed the Tax Court's adoption of nearly identical language, lead to the conclusion the Tax Court itself expressed: Under the Rule formerly designated Rule 182(b), now designated 183(c), special trial judge findings carry "special weight insofar as those findings are determined by the opportunity to hear and observe the witnesses." Tax Ct. Rule 182 note, 60 T. C. 1150 (1973); see *Stone* v. *Commissioner*, 865 F. 2d 342, 345 (CADC 1989).

Under Rule 182 as it was formulated in 1973, the Tax Court's review of the special trial judge's report was a transparent process. Rule 182(b) provided for service of copies of the special trial judge's report on the parties and Rule 182(c) allowed parties to file exceptions to the report. 60 T. C., at 1149. The process resembled a district court's review of a magistrate judge's report and recommendation: The regular Tax Court judge reviewed the special trial judge's report independently, on the basis of the record and the parties' objections to the report. See Rule 182(c), (d), *id.*, at 1149–1150. In years before 1984, the Tax Court ac-

[11] Court of Claims Rule 147(b) provided:

"The court may adopt the [trial judge's] report, including conclusions of fact and law, or may modify it, or reject it in whole or in part, or direct the [trial judge] to receive further evidence, or refer the case back to him with instructions. Due regard shall be given to the circumstance that the [trial judge] had the opportunity to evaluate the credibility of the witnesses; and the findings of fact made by the [trial judge] shall be presumed to be correct." 28 U. S. C. App., p. 7903 (1970 ed.).

knowledged instances in which it "disagree[d] with the Special Trial Judge," see *Rosenbaum* v. *Commissioner*, 45 TCM 825, 827 (1983), ¶ 83,113 P–H Memo TC, p. 373, or modified the special trial judge's findings, see *Taylor* v. *Commissioner*, 41 TCM 539 (1980), ¶ 80,552 P–H Memo TC, p. 2344 (adopting special trial judge's report with "some modifications"). Parties were therefore equipped to argue to an appellate court that the Tax Court failed to give the special trial judge's findings the measure of respect required by Rule 182(d)'s "[d]ue regard" and "presumed to be correct" formulations.

In 1983, the Tax Court amended the Rule, which it simultaneously renumbered as Rule 183. The 1983 change eliminated the provision, formerly in Rule 182(b), for service of copies of the special trial judge's report on the parties; it also eliminated the procedure, formerly in Rule 182(c), permitting the parties to file exceptions to the report. See Rule 183 note, 81 T. C., at 1069–1070. The Tax Court left intact, however, the Rule's call for "[d]ue regard" to the special trial judge's credibility determinations and the instruction that "the findings of fact recommended by the Special Trial Judge shall be presumed to be correct." Rule 183(c), *id.*, at 1069. Further, the 1983 amendments did not purport to change the character of the action the Tax Court judge could take on the special trial judge's report; as before, the Tax Court could "adopt" the report, "modify it," or "reject it in whole or in part." *Ibid.* In practice, however, the Tax Court stopped acknowledging instances in which it rejected or modified special trial judge findings. Judge Cudahy, in dissent in the Seventh Circuit, commented on the "extraordinary unanimity" that has prevailed since the 1983 amendments: "Never, in any instance since the adoption of the current Rule 183 that I could find," Judge Cudahy reported, "has a Tax Court judge *not* agreed with and adopted the [special trial judge's] opinion." *Kanter*, 337 F. 3d, at 876; cf. Tr. of Oral Arg. 44 (Counsel for the Commissioner, in re-

sponse to the Court's question, stated: "We're not aware of any cases in which the Tax Court judge has rejected the [special trial judge's] findings . . . .").

It appears from these cases and from the Commissioner's representations to this Court that the Tax Court, following the 1983 amendments to Rule 183, inaugurated a novel practice regarding the report the special trial judge submits post-trial to the Chief Judge. No longer does the Tax Court judge assigned to the case alone review the report and issue a decision adopting it, modifying it, or rejecting it in whole or in part. Instead, the Tax Court judge treats the special trial judge's report essentially as an in-house draft to be worked over collaboratively by the regular judge and the special trial judge. See *id.*, at 38 (Counsel for the Commissioner acknowledged that the special trial judge and regular Tax Court judge engage in "a collegial deliberative process," and that such a process, "involving more than one person . . . in the decision-making," is "unusual"); see also *id.*, at 29–30 (referring to "the deliberative process" occurring after the special trial judge submits his report to the Chief Judge); *Kanter*, 337 F. 3d, at 876–877 (Cudahy, J., dissenting). Nowhere in the Tax Court's Rules is this joint enterprise described.[12]

When the collaborative process is complete, the Tax Court judge issues a decision in all cases "agree[ing] with and adopt[ing] the opinion of the Special Trial Judge." See *supra*, at 46. The extent to which that "opinion" modifies or rejects the special trial judge's Rule 183(b) findings and opinion, and is in significant part prompted or written by the regular Tax Court judge, is undisclosed. Cf. Order of Apr. 26, 2000, App. to Kanter Pet. for Cert. 108a (denying motion for access to original special trial judge report prepared

[12] Nor does any other Tax Court publication, such as an interpretive guide or policy statement, suggest that the 1983 amendments to Rule 183 altered the internal process by which the Tax Court judge reviews the special trial judge's findings.

under Rule 183(b), Tax Court Judge Dawson stated: "Special Trial Judge Couvillion submitted his report . . . pursuant to Rule 183(b), which ultimately became the Memorandum Findings of Fact and Opinion . . . filed on December 15, 1999.").[13]

Judge Cudahy appears accurately to have described the process operative in the Tax Court:

> "[T]here are two '[special trial judge's] reports' in many . . . Tax Court cases—the original 'report' filed under Rule 183 with the Chief Judge of the Tax Court, which is solely the work product of the [special trial judge] (and which represented the [special trial judge's] views at the end of trial) and the later 'opinion' of the [special trial judge], which is a collaborative effort, but which the Tax Court then 'agrees with and adopts' as the opinion of the Tax Court." *Kanter*, 337 F. 3d, at 876.

Notably, however, the Tax Court Rules refer only once to a special trial judge "opinion": "[T]he Special Trial Judge shall submit a report, including findings of fact and *opinion*, to the Chief Judge." Tax Ct. Rule 183(b), 26 U. S. C. App., p. 1619 (emphasis added). That opinion, included in a report completed and submitted *before* a regular Tax Court judge is assigned to the case, is the sole opinion properly ascribed to the special trial judge under the current Rules. Correspondingly, it is the Rule 183(b) report, not some subsequently composed collaborative report, that Rule 183(c), tellingly captioned "Action on the Report," instructs the Tax Court judge to review and adopt, modify, or reject. See Rule 183(c) (the Tax Court judge "may adopt the Special

[13] The Tax Court's post-1983 process for reviewing special trial judge reports appears not to have been comprehended, even by cognoscenti, prior to the airing it has received in these cases. See Cahill, Tax Judges Decide Cases They Do Not Hear, 37 ABA J. E-Report 3 (Sept. 27, 2002) (quoting tax attorney Gerald Kafka's statement that "[w]hen this case surfaced, a lot of people scratched their heads" (internal quotation marks omitted)).

Trial Judge's report").[14] In the review process contemplated by Rule 183(c), the Tax Court judge must accord deference to the special trial judge's findings. *Ibid.* One would be hard put to explain, however, how a final decisionmaker, here the Tax Court judge, would give "[d]ue regard" to, and "presum[e] to be correct," an opinion the judge himself collaborated in producing.

However efficient the Tax Court's current practice may be, we find no warrant for it in the Rules the Tax Court publishes. The Tax Court, like all other decisionmaking tribunals, is obliged to follow its own Rules. See *Service* v. *Dulles*, 354 U. S. 363, 388 (1957) (Secretary of State "could not, so long as the Regulations remained unchanged, proceed without regard to them"); see also *Vitarelli* v. *Seaton*, 359 U. S. 535, 540 (1959) (Secretary bound by regulations he promulgated "even though without such regulations" he could have taken the challenged action); *id.*, at 546–547 (Frankfurter, J., concurring in part and dissenting in part) (observing that an agency, all Members of the Court agreed, and "rightly so," "must be rigorously held to the standards by which it professes its action to be judged"). Although the Tax Court is not without leeway in interpreting its own Rules, it is unreasonable to read into Rule 183 an unprovided-for collaborative process, and to interpret the formulations "[d]ue regard" and "presumed to be correct" to convey something other than what those same words meant prior to the 1983 rule changes. See *supra*, at 54–56.

The Tax Court's practice of not disclosing the special trial judge's original report, and of obscuring the Tax Court judge's mode of reviewing that report, impedes fully in-

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[14] The Tax Court, we are confident, would not woodenly apply its Rules to prevent a special trial judge from correcting a clerical error. But see *post*, at 71, n. 6 (REHNQUIST, C. J., dissenting). Moreover, if the special trial judge, on rereading his Rule 183(b) report postsubmission, detects an error of substance, the special trial judge might ask to have the report "recommit[ted]" for modification. See Rule 183(c).

formed appellate review of the Tax Court's decision. In directing the Tax Court judge to give "[d]ue regard" to the special trial judge's credibility determinations and to "presum[e] . . . correct" the special trial judge's factfindings, Rule 183(c) recognizes a well-founded, commonly accepted understanding: The officer who hears witnesses and sifts through evidence in the first instance will have a comprehensive view of the case that cannot be conveyed full strength by a paper record.

Fraud cases, in particular, may involve critical credibility assessments, rendering the appraisals of the judge who presided at trial vital to the Tax Court's ultimate determinations. These cases are illustrative. The Tax Court's decision repeatedly draws outcome-influencing conclusions regarding the credibility of Ballard, Kanter, and several other witnesses. See, *e. g.*, *Investment Research Assoc.*, 78 TCM, at 1060, ¶ 99,407 RIA Memo TC, p. 2675 ("We find Kanter's testimony to be implausible."); *id.*, at 1083, ¶ 99,407 RIA Memo TC, p. 2703 ("[W]e find Ballard's testimony vague, evasive, and unreliable."); *id.*, at 1079, ¶ 99,407 RIA Memo TC, p. 2698 ("The testimony of Thomas Lisle, Melinda Ballard, Hart, and Albrecht is not credible."); *id.*, at 1140, ¶ 99,407 RIA Memo TC, p. 2776 ("[T]he witnesses presented on behalf of [Investment Research Associates] in this case were obviously biased, and their testimony was not credible."). Absent access to the special trial judge's Rule 183(b) report in this and similar cases, the appellate court will be at a loss to determine (1) whether the credibility and other findings made in that report were accorded "[d]ue regard" and were "presumed . . . correct" by the Tax Court judge, or (2) whether they were displaced without adherence to those standards. See *Kanter*, 337 F. 3d, at 886 (Cudahy, J., concurring in part and dissenting in part) ("I can think of no single item of more significance in evaluating a Tax Court's decision

on fraud than the unfiltered findings of the [special trial judge] who stood watch over the trial.").

The Commissioner urges, however, that the special trial judge's report is an internal draft, a mere "step" in a "confidential decisional process," and therefore properly withheld from a reviewing court. See Brief for Respondent 16–17 (courts should not "probe the mental processes" of decisional authorities (quoting *United States* v. *Morgan*, 313 U. S. 409, 422 (1941))); accord Order of Aug. 30, 2000, App. to Kanter Pet. for Cert. 101a. Our conclusion that Rule 183 does not authorize the Tax Court to treat the special trial judge's Rule 183(b) report as a draft subject to collaborative revision, see *supra*, at 59–60, disposes of this argument. The Commissioner may not rely on the Tax Court's arbitrary construction of its own rules to insulate special trial judge reports from disclosure. Cf. *Kanter*, 337 F. 3d, at 888 (Cudahy, J., concurring in part and dissenting in part) (access on appeal to the special trial judge's Rule 183(b) report should not be blocked by the Tax Court's "concealment of [its] revision process behind th[e] verbal formula" through which the Tax Court judge purports to "agre[e] with and adop[t]" the opinion of the special trial judge (internal quotation marks omitted)).

We are all the more resistant to the Tax Court's concealment of the only special trial judge report its Rules authorize given the generally prevailing practice regarding a tribunal's use of hearing officers. The initial findings or recommendations of magistrate judges, special masters, and bankruptcy judges are available to the appellate court authorized to review the operative decision of the district court. See 28 U. S. C. §636(b)(1)(C) (magistrate judge's proposed findings must be filed with the court and mailed to the parties); Fed. Rule Civ. Proc. 53(f) (special masters); Fed. Rule Bkrtcy. Proc. 9033(a), (d) (bankruptcy judges); Fed. Rule App. Proc. 10(a) (record on appeal includes the original papers filed in

the district court). And the Administrative Procedure Act provides: "All decisions, including initial, recommended, and tentative decisions, are a part of the record" on appeal. 5 U. S. C. § 557(c); see also § 706 (the reviewing court shall evaluate the "whole record"). In comparison to the nearly universal practice of transparency in forums in which one official conducts the trial (and thus sees and hears the witnesses), and another official subsequently renders the final decision, the Tax Court's practice is anomalous. As one observer asked: "[I]f there are policy reasons that dictate transparency for everyone else, why do these reasons not apply to the Tax Court?" *Kanter*, 337 F. 3d, at 874 (Cudahy, J., concurring in part and dissenting in part); cf. *Mazza* v. *Cavicchia*, 15 N. J. 498, 519, 105 A. 2d 545, 557 (1954) ("We have not been able to find a single case in any state . . . justifying or attempting to justify the use of secret reports by a hearer to the head of an administrative agency.").[15]

The Commissioner asserts, however, that the Tax Court's practice of replacing the special trial judge's initial report with a "collaborative" report and refusing to disclose the initial report is neither "unique" nor "aberrational." Brief for Respondent 31. As a "direct *statutory* analog," *ibid.*, the Commissioner points to 26 U. S. C. § 7460(b), the provision

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[15] It is curious that the Commissioner, always a party in Tax Court proceedings, argues strenuously in support of concealment of the special trial judge's report. As Judge Cudahy noted, the Tax Court's current practice allows it "very easily [to] reverse findings (credibility-related and otherwise) of [special trial judges] in a manner that is detrimental to the Commissioner as well as to" taxpayers. *Kanter*, 337 F. 3d, at 888 (concurring in part and dissenting in part). Inclusion of the report in the record on appeal would therefore seem "a procedural result that may benefit all parties." *Ibid.*; see Tr. of Oral Arg. 28 (Court inquired of counsel for the Commissioner: "[A]ren't there situations where it might be that the special trial judge would call a credibility question in the Government's favor and then the Government loses the case before the Tax Court judge and might like to know, before it goes to the court of appeals, how solid the credibility findings were?").

governing cases reviewed by the full Tax Court. Section 7460(b) instructs that when the full Tax Court reviews the decision of a single Tax Court judge, the initial one-judge decision "shall not be a part of the record." For several reasons, we reject the Commissioner's endeavor to equate proceedings that differ markedly.

First, as the Commissioner himself observes, omission of the single Tax Court judge's opinion from the record when full court review occurs has been the *statutory* rule "[f]rom the earliest days of the Tax Court's predecessor." Brief for Respondent 31 (citing Revenue Act of 1928, ch. 852, § 601, 45 Stat. 871). To this day, Congress has ordered no corresponding omission of special trial judge initial reports. Understandably so. Full Tax Court review is designed for the resolution of legal issues, not for review of findings of fact made by the judge who presided at trial. See L. Lederman & S. Mazza, Tax Controversies: Practice and Procedure 247 (2000). When the full Tax Court reviews, it is making a *de novo* determination of the legal issue presented. In contrast, findings of fact are key to special trial judge reports. See Tax Ct. Rule 183(c), 26 U. S. C. App., p. 1619. And those findings, under the Tax Court's Rules, are not subject to review *de novo*. Instead, they are measured against "[d]ue regard" and "presumed correct" standards. *Ibid.*; see *supra*, at 54–56.

Furthermore, the judges composing the full Tax Court and the individual Tax Court judge who made the decision under review are presidential appointees equal in rank. Each has an equal voice in the business of the Tax Court. To the extent that the individual judge disagrees with his colleagues, he is free to file a dissenting opinion repeating or borrowing from his initial decision. The special trial judge, serving at the pleasure of the Tax Court, lacks the independence enjoyed by regular Tax Court judges and the prerogative to publish dissenting views. See *Kanter*, 337 F. 3d, at

879–880 (Cudahy, J., concurring in part and dissenting in part).[16]

We note, finally, other arguments tendered by the taxpayers. Ballard and Kanter urge that the Due Process Clause requires disclosure of a trial judge's factfindings that have operative weight in a court's final decision. Brief for Petitioner Ballard 43–48; Brief for Petitioner Kanter 19–27. They also argue that, just as reports of special masters, magistrate judges, and bankruptcy judges form part of the record on appeal from a district court, so special trial judge reports must form part of the record on appeal from the Tax Court. They base this argument on the appellate review statute, 26 U. S. C. § 7482(a)(1), which instructs courts of appeals to review Tax Court decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury." Brief for Petitioner Ballard 23–27 (internal quotation marks omitted); Brief for Petitioner Kanter 27, 34–35. In addition, they maintain that 26 U. S. C. §§ 7459(b) and 7461(a) require disclosure of all re-

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[16] The Commissioner also notes that "numerous boards of contract appeals established by various agencies . . . do not require disclosure of initial reports prepared by presiding judges." Brief for Respondent 31–32. This analogy, too, is unimpressive. The contract dispute resolution panels to which the Commissioner points issue decisions after reviewing the initial report of a "presiding judge," designated to conduct an evidentiary hearing on behalf of the panel. Only the final decision is served on the parties and included in the record on appeal. *Ibid.* Unlike the situation of the special trial judge, however, the presiding judge holds a position equal in stature to that of the other panel members, and can file a dissent. See Reply Brief for Petitioner Kanter 15.

In discussing the text of Rule 183(b) and (c), and the Tax Court's current interpretation of that text, we surely do not intend to "impugn the integrity" of any Tax Court judge. Compare *post*, at 72 (opinion of REHNQUIST, C. J.), with *Kanter*, 337 F. 3d, at 880, n. 6 (Cudahy, J., concurring in part and dissenting in part) ("I am not suggesting that . . . the judges of the Tax Court . . . exert undue influence over [special trial judges]. The judicial independence of finders of fact, however, is a structural principle.").

ports generated in Tax Court proceedings, absent specific exemption. Brief for Petitioner Kanter 42–44. Because we hold that the Tax Court's Rules do not authorize the practice that the Tax Court now follows, we need not reach these arguments and express no opinion on them.

The idiosyncratic procedure the Commissioner describes and defends, although not the system of adjudication that Rule 183 currently creates, is one the Tax Court might someday adopt. Were the Tax Court to amend its Rules to express the changed character of the Tax Court judge's review of special trial judge reports, that change would, of course, be subject to appellate review for consistency with the relevant federal statutes and due process.

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For the reasons stated, the judgments of the Courts of Appeals for the Seventh and Eleventh Circuits are reversed, and the cases are remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE KENNEDY, with whom JUSTICE SCALIA joins, concurring.

I concur in the opinion of the Court and note some points that may be considered in further proceedings, after the cases are remanded.

The Court is correct, in my view, in holding, first, that Tax Court Rule 183(c) mandates "that deference is due to factfindings made by the [special] trial judge," *ante*, at 54, and, second, that "it is the Rule 183(b) report . . . that Rule 183(c) . . . instructs the Tax Court judge to review and adopt, modify, or reject," *ante*, at 58.

The latter holding is supported by the most natural reading of the text of Rule 183. Accepting the Commissioner of Internal Revenue's contrary construction would require reading the word "report" in subdivisions (b) and (c) to mean

two different things. One additional indication in the text, moreover, is contrary to the Commissioner's position. Rule 183(c) authorizes the Tax Court judge to "recommit the report with instructions" to the special trial judge. Recommittal is generally a formal mechanism for initiating reconsideration or other formal action by the initial decisionmaker. See, *e. g.*, Fed. Rule Civ. Proc. 72(b) ("The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions"); Fed. Rule Civ. Proc. 53(e)(2) (amended 2003) ("The court after hearing may adopt the [special master's] report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions"); cf. *Kansas* v. *Colorado*, 543 U. S. 86, 106 (2004) ("We accept the Special Master's recommendations and recommit the case to the Special Master for preparation of a decree consistent with this opinion"). Given that Tax Court Rule 183(c) provides a formal channel for the Tax Court judge to send a report back to the special trial judge for reconsideration, it is difficult to interpret the Rule to permit the informal process the Commissioner and the dissenting opinion defend here.

If the Tax Court deems it necessary to allow informal consultation and collaboration between the special trial judge and the Tax Court judge, it might design a rule for that process. If, on the other hand, it were to insist on more formality—with deference to the special trial judge's report and an obligation on the part of the Tax Court judge to describe the reasons for any substantial departures from the original findings—without requiring disclosure of the initial report, that would present a more problematic approach. It is not often that a rule requiring deference to the original factfinder exists, but the affected parties have no means of ensuring its enforcement.

That brings us to the questions of how these cases should be resolved on remand and how the current version of the

Rule should be interpreted in later cases. As to the former, this question is difficult because we do not know what happened in the Tax Court, a point that is important to underscore here. From a single affidavit, the majority extrapolates "a novel practice" whereby the Tax Court treats the initial special trial judge report as "an in-house draft to be worked over collaboratively by the regular judge and the special trial judge." *Ante*, at 57. I interpret the opinion as indicating that there might be such a practice, not that there is. The dissent, in contrast, appears to assume that any changes to the initial report were the result of reconsideration by the special trial judge or informal suggestions by the Tax Court judge. *Post*, at 70–71 (opinion of REHNQUIST, C. J.). Given the sparse record before us, I would not be so quick to make either assumption, particularly given that the Commissioner, charged with defending the Tax Court's decision, is no more privy to the inner workings of the Tax Court than we are.

Given the lingering uncertainty about whether the initial report was in fact altered or superseded, and the extent of any changes, there are factual questions that still must be resolved. If the initial report was not substantially altered, then there will have been no violation of the Rule. If, on the other hand, substantial revisions were made during a collaborative effort between the special trial judge and the Tax Court judge, the Tax Court might remedy that breach of the Rule in different ways. For instance, it could simply recommit the special trial judge's initial report and start over from there. More likely in these circumstances the remedy would be for the Tax Court to disclose the report that Judge Couvillion submitted on or before September 2, 1998.

This leads to the question of how Rule 183 should be interpreted in future cases. Rule 183's requirement of deference to the special trial judge surely implies that the parties to the litigation will have the means of knowing whether defer-

ence has been given and of mounting a challenge if it has not. Thus, a reasonable reading of the Rule requires the litigants and the courts of appeals to be able to evaluate any changes made to the findings of fact in the special trial judge's initial report. Including the original findings of fact in the record on appeal would make that possible.

All of these matters should be addressed in the first instance by the Courts of Appeals or by the Tax Court.

With these observations, I join the Court's opinion.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE THOMAS joins, dissenting.

The Court reverses the judgments of the Courts of Appeals on the ground that Tax Court Rule 183 does not "authorize the practice that the Tax Court now follows." *Ante*, at 65.[1] I disagree. The Tax Court's compliance with its own Rules is a matter on which we should defer to the interpretation of that court. I therefore dissent.

The Tax Court interprets Rule 183 not to require the disclosure of the report submitted by the special trial judge

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[1] It bespeaks the weakness of the taxpayers' arguments that the Court hinges its conclusion on an argument not even presented for our consideration. See Tr. of Oral Arg. 46 (Deputy Solicitor General Hungar noting that compliance with Rule 183 was not included within the questions presented). This Court does not consider claims that are not included within a petitioner's questions presented. See this Court's Rule 14.1(a); *Yee* v. *Escondido*, 503 U. S. 519, 535–538 (1992). Two of the taxpayers' three claims included in the four questions presented do not even mention Rule 183, instead claiming violations of due process, U. S. Const., Art. III, and governing federal statutes, 26 U. S. C. §§ 7459, 7461, and 7482. The only question presented that mentions Rule 183 is limited to asking whether Rule 183 requires the Tax Court to uphold findings of fact made by a special trial judge unless they are "'clearly erroneous.'" Kanter Pet. for Cert. (i). Nor was this argument contained within the taxpayers' certiorari petitions or in their briefs submitted to the Courts of Appeals. See *Lopez* v. *Davis*, 531 U. S. 230, 244, n. 6 (2001). Only by failing to abide by our own Rules can the Court hold that the Tax Court failed to follow its Rules.

pursuant to paragraph (b) when the Tax Court judge adopts the special trial judge's report. In 1983, the Tax Court amended the Rule to eliminate the requirement that the special trial judge's submitted report be disclosed to the parties so that they could file exceptions before the Tax Court judge acted on the report. See Tax Ct. Rule 183 note, 81 T. C. 1069–1070 (1984). The 1983 amendment also changed the Rule to require that the special trial judge "submit" his report to the Chief Judge instead of "file" it, see Tax Ct. Rule 182(b), 60 T. C. 1150 (1973), thereby removing the initial report from the appellate record. See Fed. Rule App. Proc. 10(a)(1) (requiring the record on appeal contain "the original papers and exhibits *filed* in the district court" (emphasis added)).[2]

Consistent with these amendments, in an opinion signed by Judge Dawson, Special Trial Judge Couvillion, and Chief Judge Wells, the Tax Court held that disclosure of the Rule 183(b) report was not required in these cases because "[t]he only official Memorandum Findings of Fact and Opinion by the Court in these cases is T. C. Memo. 1999–407, filed on December 15, 1999, by Special Trial Judge Couvillion, reviewed and adopted by Judge Dawson, and reviewed and approved by former Chief Judge Cohen." Order of Aug. 30, 2000, in No. 43966–85 etc. (TC), App. to Kanter Pet. for Cert. 102a (hereinafter Order of Aug. 30, App. to Kanter Pet. for Cert.).[3] The Commissioner's brief makes clear that any

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[2] By contrast, a "magistrate judge shall *file* his proposed findings and recommendations . . . with the court and a copy shall forthwith be mailed to all parties." 28 U. S. C. § 636(b)(1)(C) (emphasis added).

[3] See also Order of Aug. 30, App. to Kanter Pet. for Cert. 102a ("Judge Dawson states and Special Trial Judge Couvillion agrees, that, after a meticulous and time-consuming review of the complex record in these cases, Judge Dawson adopted the findings of fact and opinion of Special Trial Judge Couvillion, . . . Judge Dawson presumed the findings of fact recommended by Special Trial Judge Couvillion were correct, and . . . Judge Dawson gave due regard to the circumstance that Special Trial Judge Couvillion evaluated the credibility of witnesses"); Order of

changes that might exist between the special trial judge's initial opinion and his final opinion "would presumptively be the result of the [special trial judge's] legitimate reevaluation of the case." Brief for Respondent 11; accord, Brief for Appellee in No. 01–17249 (CA11), pp. 92–93; Brief for Appellee in No. 01–4316 etc. (CA7), pp. 122–123. Thus, consistent with its practice during the more than 20 years since Rule 183 was adopted in its current form, the Tax Court interprets Rule 183 as not requiring disclosure of "any preliminary drafts of reports or opinions." Order of Apr. 26, 2000, in No. 43966–85 etc. (TC), App. to Kanter Pet. for Cert. 109a.

Because this interpretation of Rule 183 is reasonable, it should be accepted. An agency's interpretation of its own rule or regulation is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U. S. 410, 414 (1945); see also *United States* v. *Cleveland Indians Baseball Co.*, 532 U. S. 200, 219–220 (2001); *Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U. S. 144, 150–157 (1991).[4]

Notwithstanding the deference owed the Tax Court's legitimate interpretation of this Rule, the Court reads the Rule as requiring disclosure of the submitted report because paragraph (c) requires action on "the Special Trial Judge's *[initial]* report." See *ante*, at 58–59 (internal quotation marks omitted). To the contrary, Rule 183 mandates only that action be taken on "the Special Trial Judge's report." The Rule is silent on whether the special trial judge may correct

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Apr. 26, 2000, in No. 43966–85 etc. (TC), *id.*, at 108a (noting that findings of fact and credibility assessments made by Special Trial Judge Couvillion were "reflected in the Memorandum Findings of Fact and Opinion (T. C. Memo. 1999–407)").

[4] Though the Tax Court is an Article I court and not an executive agency, *Freytag* v. *Commissioner*, 501 U. S. 868, 887–888 (1991), there is no reason why *Seminole Rock* deference does not extend to the Tax Court's interpretation of its own procedural rules. See *ante*, at 59 ("[T]he Tax Court is not without leeway in interpreting its own Rules").

technical or substantive errors in his original report after it is submitted to the Chief Judge and before the Tax Court judge takes action, either on his own initiative or by informal suggestion. Paragraph (c)'s use of the possessive "Special Trial Judge's report" is most naturally read to refer to the report authored and ascribed to by the special trial judge.[5] If the special trial judge changes his report, then the new version becomes "the Special Trial Judge's report." It is the special trial judge's signature that makes the report attributable to him. At the very least, it is not unreasonable or arbitrary for the Tax Court to construe the Rule as not requiring the disclosure of preliminary drafts or reports.[6] See *Estate of Kanter* v. *Commissioner*, 337 F. 3d 833, 841 (CA7 2003) ("[I]t is clear that the Tax Court's own rules do not require the report to be disclosed . . . ").

Nor does the Court's claim that judicial review is impeded withstand scrutiny. Because paragraph (c) can be read, as the Tax Court does, to permit the adoption of the report authored and signed by the special trial judge, the Courts of

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[5] There can be no claim made that Tax Court Judge Dawson, and not Special Trial Judge Couvillion, wrote and controlled the content of the report. See, *e. g.*, Brief for Respondent 11 (noting that any changes to a special trial judge's report "would presumptively be the result of the STJ's legitimate reevaluation of the case"); Tr. of Oral Arg. 31 ("The only way it is possible for there to be a change is for the special trial judge himself to determine, in the exercise of his responsibility as a judicial officer, that he made a mistake"); Order of Aug. 30, App. to Kanter Pet. for Cert. 102a (indicating the adopted report was written "by Special Trial Judge Couvillion" and "adopted by Judge Dawson").

[6] Indeed, following the Court's interpretation that a Tax Court judge must act on the report submitted pursuant to paragraph (b), a Tax Court judge would be required to presume correct any factual findings that a special trial judge had disclaimed. For example, if the Special Trial Judge, after submitting a copy of his report to the Chief Judge, found a critical typographical error that the Tax Court judge might not recognize as such, then the Tax Court judge would be required, under the Court's view, to defer to the report as initially drafted instead of a corrected version of the report.

Appeals both determined that Tax Judge Dawson expressly adopted Special Trial Judge Couvillion's report. *Id.*, at 840–841; *Ballard* v. *Commissioner*, 321 F. 3d 1037, 1038–1039 (CA11 2003). There can be no doubt that in *adopting* Special Trial Judge Couvillion's findings of fact as well as his legal conclusions in their entirety, Tax Court Judge Dawson complied with whatever degree of deference is required by Rule 183(c).

Contrary to the Court's claimed distinctions, the statutory requirement that a Tax Court judge's initial opinion not be published when the Chief Judge directs that such opinion be reviewed by the full Tax Court is quite analogous to the Tax Court's interpretation of Rule 183. See 26 U. S. C. § 7460(b); *Estate of Varian* v. *Commissioner*, 396 F. 2d 753 (CA9 1968). A Tax Court judge whose decision is being reviewed may dissent from the full court's decision. Similarly, the special trial judge may choose not to change his initial findings of fact and opinion. In order to distinguish § 7460(b), the Court implies that Tax Court Judge Dawson exercised, or at least may have exercised, undue influence or improper control over Special Trial Judge Couvillion.[7] See *ante*, at 62. This Court generally does not assume abdication or impropriety, see *Freytag* v. *Commissioner*, 501 U. S. 868, 872, n. 2 (1991); *United States* v. *Morgan*, 313 U. S. 409, 422 (1941); *Fayerweather* v. *Ritch*, 195 U. S. 276, 306 (1904), and should not impugn the integrity of judges based on an unsubstantiated, nonspecific affidavit.[8]

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[7] Any implication that Judge Dawson used his higher "rank" to exert improper influence or control is particularly inapt in these cases: Judge Dawson, as a retired Tax Court judge recalled into duty by the Chief Judge, has absolutely no authority over Special Trial Judge Couvillion as both serve at the will of the Tax Court's Chief Judge. See 26 U. S. C. §§ 7443A, 7447(c).

[8] The mere absence of any post-1983 decisions in which a Tax Court judge disagreed with a special trial judge does not support the Court's broad charges. A similar degree of agreement was evident *prior* to 1983 when the special trial judge's report was filed and served on the parties,

In sum, Rule 183 is silent on the question whether the report submitted to the Chief Judge pursuant to paragraph (b) must be the same report acted on by the Tax Court judge under paragraph (c). This Court should therefore defer to the Tax Court's interpretation of the Rule, as amended in 1983, allowing the disclosure of only the special trial judge's report that was adopted by the Tax Court judge.

As every Court of Appeals to consider the arguments has concluded, the taxpayer's statutory and constitutional arguments are not colorable. See *Estate of Lisle* v. *Commissioner*, 341 F. 3d 364, 384 (CA5 2003); *Estate of Kanter* v. *Commissioner*, *supra*, at 840–843; *Ballard* v. *Commissioner*, *supra*, at 1042–1043. I agree with those conclusions.[9]

For these reasons, I would affirm the Courts of Appeals.

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who had the opportunity to file exceptions. From 1976 to 1983, for example, less than one percent (6 out of 680) of special trial judge reports were not adopted by the Tax Court judge, only 1 case reversed the special trial judge, and only 14 cases involved adoption with mostly minor modifications. See Brief for Respondent 17–18, and n. 4.

[9] With respect to the taxpayers' statutory arguments, 26 U. S. C. §§ 7459 and 7461 require only the disclosure of reports adopted by the Tax Court and not those reports that are not adopted. See §§ 7459 ("shall be the duty of the Tax Court . . . to include in *its* report upon any proceeding its findings of fact or opinion or memorandum opinion" (emphasis added)), 7461 ("[R]eports *of the Tax Court*" shall be public records (emphasis added)). Section 7482, which requires courts of appeals to review "decisions of the Tax Court" in the same manner as they review similar district court decisions, was passed to eliminate any special deference paid to Tax Court decisions, see *Dobson* v. *Commissioner*, 320 U. S. 489 (1943), does not portend to govern the record on appeal, cf. Fed. Rules App. Proc. 10 and 13, and addresses only the decisions of the Tax Court—not special trial judge reports.

As to their constitutional arguments, neither due process nor Article III requires disclosure. Disclosure of any report that has been abandoned by the special trial judge is in no way necessary to effective appellate review because the adoption of the special trial judge's report ensures that sufficient deference was given. Nor must all reports be disclosed in order for the Tax Court procedure itself to comport with due process. See *Morgan* v. *United States*, 298 U. S. 468, 478, 481–482 (1936).

Syllabus

# WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL. *v.* DOTSON ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03–287. Argued December 6, 2004—Decided March 7, 2005

Respondents Dotson and Johnson are Ohio state prisoners. After parole officials determined that Dotson was not eligible for parole and that Johnson was not suitable for parole, they brought separate actions for declaratory and injunctive relief under 42 U. S. C. § 1983, claiming that Ohio's parole procedures violate the Federal Constitution. In each case, the Federal District Court concluded that a § 1983 action does not lie and that the prisoner would have to seek relief through a habeas corpus suit. The Sixth Circuit ultimately consolidated the cases and reversed, finding that the actions could proceed under § 1983.

*Held:* State prisoners may bring a § 1983 action for declaratory and injunctive relief challenging the constitutionality of state parole procedures; they need not seek relief exclusively under the federal habeas corpus statutes. Pp. 78–85.

(a) Ohio argues unsuccessfully that respondents' claims may only be brought in federal habeas (or similar state) proceedings because a state prisoner cannot use a § 1983 action to challenge "the fact or duration of his confinement," *e. g.*, *Preiser* v. *Rodriguez*, 411 U. S. 475, 489, and respondents' lawsuits, in effect, collaterally attack their confinements' duration. That argument jumps from a true premise (that in all likelihood the prisoners hope their suits will help bring about earlier release) to a faulty conclusion (that habeas is their sole avenue for relief). This Court's case law makes clear that the connection between the constitutionality of the prisoners' parole proceedings and release from confinement is too tenuous here to achieve Ohio's legal door-closing objective. From *Preiser* to *Edwards* v. *Balisok*, 520 U. S. 641, this Court has developed an exception from § 1983's otherwise broad scope for actions that lie "within the core of habeas corpus," *Preiser*, *supra*, at 487, *i. e.*, where a state prisoner requests present or future release. Section 1983 remains available for procedural challenges where success *would not necessarily* spell immediate or speedier release for the prisoner, *e. g.*, *Wolff* v. *McDonnell*, 418 U. S. 539, but the prisoner cannot use § 1983 to obtain relief where success *would necessarily* demonstrate the invalidity of

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confinement or its duration, *e. g.*, *Heck* v. *Humphrey*, 512 U. S. 477. Here, respondents' claims are cognizable under § 1983, *i. e.*, they do not fall within the implicit habeas exception. They seek relief that will render invalid the state procedures used to deny parole eligibility (Dotson) and parole suitability (Johnson). See *Wolff*, *supra*, at 554–555. Neither prisoner seeks an injunction ordering his immediate or speedier release into the community. See, *e. g.*, *Preiser*, *supra*, at 500. And as in *Wolff*, a favorable judgment will not "necessarily imply the invalidity of [their] conviction[s] or sentence[s]." *Heck*, *supra*, at 487. Success for Dotson does not mean immediate release or a shorter stay in prison; it means at most new eligibility review, which may speed *consideration* of a new parole application. Success for Johnson means at most a new parole hearing at which parole authorities may, in their discretion, decline to shorten his prison term. Because neither prisoner's claim would necessarily spell speedier release, neither lies at "the core of habeas corpus." *Preiser*, *supra*, at 489. Finally, the prisoners' claims for *future* relief (which, if successful, will not necessarily imply the invalidity of confinement or shorten its duration) are yet more distant from that core. See *Balisok*, *supra*, at 648. Pp. 78–83.

(b) Ohio's additional arguments—(1) that respondents' § 1983 actions cannot lie because a favorable judgment would "necessarily imply the invalidity of [their] *sentence[s]*," *Heck*, *supra*, at 487 (emphasis added), which sentences include particular state parole procedures; and (2) that a decision for them would violate principles of federal/state comity by opening the door to federal court without prior exhaustion of state-court remedies—are not persuasive. Pp. 83–84.

329 F. 3d 463, affirmed and remanded.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SCALIA, SOUTER, THOMAS, and GINSBURG, JJ., joined. SCALIA, J., filed a concurring opinion, in which THOMAS, J., joined, *post*, p. 85. KENNEDY, J., filed a dissenting opinion, *post*, p. 88.

*Douglas R. Cole*, State Solicitor of Ohio, argued the cause for petitioners. With him on the briefs were *Jim Petro*, Attorney General, *Stephen P. Carney*, Senior Deputy Solicitor, and *Todd R. Marti*, Assistant Solicitor.

*John Q. Lewis* argued the cause for respondent Johnson. With him on the brief were *Donald B. Ayer*, *William K. Shirey II*, and *David L. Shapiro*.

*Alan E. Untereiner* argued the cause and filed a brief for respondent Dotson.*

JUSTICE BREYER delivered the opinion of the Court.

Two state prisoners brought an action under 42 U. S. C. § 1983 claiming that Ohio's state parole procedures violate the Federal Constitution. The prisoners seek declaratory and injunctive relief. The question before us is whether they may bring such an action under Rev. Stat. § 1979, 42 U. S. C. § 1983, the Civil Rights Act of 1871, or whether they must instead seek relief exclusively under the federal habeas corpus statutes. We conclude that these actions may be brought under § 1983.

I

The two respondents, William Dotson and Rogerico Johnson, are currently serving lengthy terms in Ohio prisons. Dotson began to serve a life sentence in 1981. The parole board rejected his first parole request in 1995; and a parole officer, after reviewing Dotson's records in the year 2000, determined that he should not receive further consideration for parole for at least five more years. In reaching this conclusion about Dotson's parole eligibility, the officer used parole guidelines first adopted in 1998, after Dotson

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*A brief of *amici curiae* urging reversal was filed for the State of Alabama et al. by *Troy King*, Attorney General of Alabama, *Kevin C. Newsom*, Solicitor General, and *Michael B. Billingsley*, Deputy Solicitor General, and by the Attorneys General for their respective States as follows: *Gregg D. Renkes* of Alaska, *M. Jane Brady* of Delaware, *Thurbert E. Baker* of Georgia, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Phill Kline* of Kansas, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Jim Hood* of Mississippi, *Jon Bruning* of Nebraska, *Gerald J. Pappert* of Pennsylvania, *Harry McMaster* of South Carolina, *Larry Long* of South Dakota, *Greg Abbott* of Texas, *Jerry W. Kilgore* of Virginia, and *Darrell V. McGraw, Jr.*, of West Virginia.

*Norman L. Sirak* and *Leonard Yelsky* filed a brief for 2,974 Former and Current Ohio Inmates et al. as *amici curiae*.

began to serve his term. Dotson claims that the retroactive application of these new, harsher guidelines to his preguidelines case violates the Constitution's *Ex Post Facto* and Due Process Clauses. He seeks a federal-court declaration to that effect as well as a permanent injunction ordering prison officials to grant him an "immediate parole hearing in accordance with the statutory laws and administrative rules in place when [he] committed his crimes." App. 20 (Dotson Complaint, Prospective Declaratory and Injunctive Relief, ¶ 3).

Johnson began to serve a 10- to 30-year prison term in 1992. The parole board considered and rejected his first parole request in 1999, finding him unsuitable for release. In making this determination, the board applied the new 1998 guidelines. Johnson too claims that the application of these new, harsher guidelines to his preguidelines case violated the Constitution's *Ex Post Facto* Clause. He also alleges that the parole board's proceedings (by having too few members present and by denying him an adequate opportunity to speak) violated the Constitution's Due Process Clause. Johnson's complaint seeks a new parole hearing conducted under constitutionally proper procedures and an injunction ordering the State to comply with constitutional due process and *ex post facto* requirements in the future.

Both prisoners brought § 1983 actions in federal court. In each case, the Federal District Court concluded that a § 1983 action does not lie and that the prisoner would have to seek relief through a habeas corpus suit. *Dotson* v. *Wilkinson*, No. 3:00 CV 7303 (ND Ohio, Aug. 7, 2000); *Johnson* v. *Ghee*, No. 4:00 CV 1075 (ND Ohio, July 16, 2000). Each prisoner appealed. The Court of Appeals for the Sixth Circuit ultimately consolidated the two appeals and heard both cases en banc. The court found that the actions could proceed under § 1983, and it reversed the lower courts. 329 F. 3d 463, 472 (2003). Ohio parole officials then petitioned for certiorari, and we granted review.

II

This Court has held that a prisoner in state custody cannot use a § 1983 action to challenge "the fact or duration of his confinement." *Preiser* v. *Rodriguez*, 411 U. S. 475, 489 (1973); see also *Wolff* v. *McDonnell*, 418 U. S. 539, 554 (1974); *Heck* v. *Humphrey*, 512 U. S. 477, 481 (1994); *Edwards* v. *Balisok*, 520 U. S. 641, 648 (1997). He must seek federal habeas corpus relief (or appropriate state relief) instead.

Ohio points out that the inmates in these cases attack their parole-eligibility proceedings (Dotson) and parole-suitability proceedings (Johnson) only because they believe that victory on their claims will lead to speedier release from prison. Consequently, Ohio argues, the prisoners' lawsuits, in effect, collaterally attack the *duration* of their confinement; hence, such a claim may only be brought through a habeas corpus action, not through § 1983.

The problem with Ohio's argument lies in its jump from a true premise (that in all likelihood the prisoners hope these actions will help bring about earlier release) to a faulty conclusion (that habeas is their sole avenue for relief). A consideration of this Court's case law makes clear that the connection between the constitutionality of the prisoners' parole proceedings and release from confinement is too tenuous here to achieve Ohio's legal door-closing objective.

The Court initially addressed the relationship between § 1983 and the federal habeas statutes in *Preiser* v. *Rodriguez*, *supra*. In that case, state prisoners brought civil rights actions attacking the constitutionality of prison disciplinary proceedings that had led to the deprivation of their good-time credits. *Id.*, at 476. The Court conceded that the language of § 1983 literally covers their claims. See § 1983 (authorizing claims alleging the deprivation of constitutional rights against every "person" acting "under color of" state law). But, the Court noted, the language of the federal habeas statutes applies as well. See 28 U. S. C. § 2254(a) (permitting claims by a person being held "in cus-

tody in violation of the Constitution"). Moreover, the Court observed, the language of the habeas statute is more specific, and the writ's history makes clear that it traditionally "has been accepted as the specific instrument to obtain release from [unlawful] confinement." *Preiser*, 411 U. S., at 486. Finally, habeas corpus actions require a petitioner fully to exhaust state remedies, which § 1983 does not. *Id.*, at 490–491; see also *Patsy* v. *Board of Regents of Fla.*, 457 U. S. 496, 507 (1982). These considerations of linguistic specificity, history, and comity led the Court to find an implicit exception from § 1983's otherwise broad scope for actions that lie "within the core of habeas corpus." *Preiser*, 411 U. S., at 487.

Defining the scope of that exception, the Court concluded that a § 1983 action will not lie when a state prisoner challenges "the fact or duration of his confinement," *id.*, at 489, and seeks either "immediate release from prison," or the "shortening" of his term of confinement, *id.*, at 482. Because an action for restoration of good-time credits in effect demands immediate release or a shorter period of detention, it attacks "the very duration of . . . physical confinement," *id.*, at 487–488, and thus lies at "the core of habeas corpus," *id.*, at 487. Therefore, the Court held, the *Preiser* prisoners could not pursue their claims under § 1983.

In *Wolff* v. *McDonnell*, *supra*, the Court elaborated the contours of this habeas corpus "core." As in *Preiser*, state prisoners brought a § 1983 action challenging prison officials' revocation of good-time credits by means of constitutionally deficient disciplinary proceedings. 418 U. S., at 553. The Court held that the prisoners could not use § 1983 to obtain restoration of the credits because *Preiser* had held that "an injunction restoring good time improperly taken is foreclosed." 418 U. S., at 555. But the inmates *could* use § 1983 to obtain a declaration ("as a predicate to" their requested damages award) that the disciplinary procedures were invalid. *Ibid.* They could also seek "by way of ancillary

relief[,] an otherwise proper injunction enjoining the *prospective* enforcement of invalid prison regulations." *Ibid.* (emphasis added). In neither case would victory for the prisoners necessarily have meant immediate release or a shorter period of incarceration; the prisoners attacked only the "wrong procedures, not . . . the wrong result (*i. e.*, [the denial of] good-time credits)." *Heck, supra,* at 483 (discussing *Wolff*).

In *Heck*, the Court considered a different, but related, circumstance. A state prisoner brought a § 1983 action for damages, challenging the conduct of state officials who, the prisoner claimed, had unconstitutionally caused his conviction by improperly investigating his crime and destroying evidence. 512 U. S., at 479. The Court pointed to "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments." *Id.*, at 486. And it held that where "establishing the basis for the damages claim necessarily demonstrates the invalidity of the conviction," *id.*, at 481–482, a § 1983 action will not lie "unless . . . the conviction or sentence has already been invalidated," *id.*, at 487. The Court then added that, where the § 1983 action, "even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment . . . , the action should be allowed to proceed." *Ibid.* (footnote omitted).

Finally, in *Edwards* v. *Balisok, supra,* the Court returned to the prison disciplinary procedure context of the kind it had addressed previously in *Preiser* and *Wolff.* Balisok sought "a declaration that the procedures employed by state officials [to deprive him of good-time credits] violated due process, . . . damages for use of the unconstitutional procedures, [and] an injunction to prevent future violations." 520 U. S., at 643. Applying *Heck,* the Court found that habeas was the sole vehicle for the inmate's constitutional challenge insofar as the prisoner sought declaratory relief and money damages, because the "principal procedural defect com-

plained of," namely, deceit and bias on the part of the decisionmaker, "would, if established, necessarily imply the invalidity of the deprivation of [Balisok's] good-time credits." 520 U. S., at 646. Hence, success on the prisoner's claim for money damages (and the accompanying claim for declaratory relief) would "necessarily imply the invalidity of the punishment imposed." *Id.*, at 648. Nonetheless, the prisoner's claim for an injunction barring *future* unconstitutional procedures did *not* fall within habeas' exclusive domain. That is because "[o]rdinarily, a prayer for such prospective relief will not 'necessarily imply' the invalidity of a previous loss of good-time credits." *Ibid.*

Throughout the legal journey from *Preiser* to *Balisok*, the Court has focused on the need to ensure that state prisoners use only habeas corpus (or similar state) remedies when they seek to invalidate the duration of their confinement—either *directly* through an injunction compelling speedier release or *indirectly* through a judicial determination that necessarily implies the unlawfulness of the State's custody. Thus, *Preiser* found an implied exception to § 1983's coverage where the claim seeks—not where it simply "relates to"—"core" habeas corpus relief, *i. e.*, where a state prisoner requests present or future release. Cf. *post*, at 92 (KENNEDY, J., dissenting) (arguing that *Preiser* covers challenges that "relate . . . to" the duration of confinement). *Wolff* makes clear that § 1983 remains available for procedural challenges where success in the action *would not necessarily* spell immediate or speedier release for the prisoner. *Heck* specifies that a prisoner cannot use § 1983 to obtain damages where success *would necessarily* imply the unlawfulness of a (not previously invalidated) conviction or sentence. And *Balisok*, like *Wolff*, demonstrates that habeas remedies do not displace § 1983 actions where success in the civil rights suit would not necessarily vitiate the legality of (not previously invalidated) state confinement. These cases, taken together, indicate that a state prisoner's § 1983 action is

barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration.

Applying these principles to the present case, we conclude that respondents' claims are cognizable under § 1983, *i. e.*, they do not fall within the implicit habeas exception. Dotson and Johnson seek relief that will render invalid the state procedures used to deny parole eligibility (Dotson) and parole suitability (Johnson). See *Wolff*, 418 U. S., at 554–555. Neither respondent seeks an injunction ordering his immediate or speedier release into the community. See *Preiser*, 411 U. S., at 500; *Wolff*, *supra*, at 554. And as in *Wolff*, a favorable judgment will not "necessarily imply the invalidity of [their] conviction[s] or sentence[s]." *Heck*, *supra*, at 487. Success for Dotson does not mean immediate release from confinement or a shorter stay in prison; it means at most new eligibility review, which at most will speed *consideration* of a new parole application. Success for Johnson means at most a new parole hearing at which Ohio parole authorities may, in their discretion, decline to shorten his prison term. See Ohio Rev. Code Ann. § 2967.03 (Lexis 2003) (describing the parole authority's broad discretionary powers); *Inmates of Orient Correctional Inst.* v. *Ohio State Adult Parole Auth.*, 929 F. 2d 233, 236 (CA6 1991) (same); see also Tr. of Oral Arg. 18 (petitioners' counsel conceding that success on respondents' claims would not inevitably lead to release). Because neither prisoner's claim would necessarily spell speedier release, neither lies at "the core of habeas corpus." *Preiser*, *supra*, at 489. Finally, the prisoners' claims for *future* relief (which, if successful, will not necessarily imply the invalidity of confinement or shorten its duration) are yet more distant from that core. See *Balisok*, *supra*, at 648.

The dissent disagrees with our legal analysis and advocates use of a different legal standard in critical part because, in its view, (1) a habeas challenge to a sentence (a "core" challenge) does not necessarily produce the prisoner's "release" (so our standard "must be . . . wrong"), see *post*, at 88, 91; and (2) *Heck*'s standard is irrelevant because *Heck* concerned only damages, see *post*, at 91. As to the first, we believe that a case challenging a sentence seeks a prisoner's "release" in the only pertinent sense: It seeks invalidation (in whole or in part) of the judgment authorizing the prisoner's confinement; the fact that the State may seek a *new* judgment (through a new trial or a new sentencing proceeding) is beside the point. As to the second, *Balisok* applied *Heck*'s standard and addressed a claim seeking not only damages, but also a separate declaration that the State's procedures were unlawful. See 520 U. S., at 643, 647–648.

## III

Ohio makes two additional arguments. First, Ohio points to language in *Heck* indicating that a prisoner's § 1983 damages action cannot lie where a favorable judgment would "necessarily imply the invalidity of his conviction *or sentence*." 512 U. S., at 487 (emphasis added). Ohio then argues that its parole proceedings are part of the prisoners' "sentence[s]"—indeed, an aspect of the "sentence[s]" that the § 1983 claims, if successful, will invalidate.

We do not find this argument persuasive. In context, *Heck* uses the word "sentence" to refer not to prison procedures, but to substantive determinations as to the length of confinement. See *Muhammad* v. *Close*, 540 U. S. 749, 751, n. 1 (2004) *(per curiam)* ("[T]he incarceration that matters under *Heck* is the incarceration ordered by the original judgment of conviction"). *Heck* uses the word "sentence" interchangeably with such other terms as "continuing confinement" and "imprisonment." 512 U. S., at 483, 486; see also

*Balisok*, *supra*, at 645, 648 (referring to the invalidity of "the judgment" or "punishment imposed"). So understood, *Heck* is consistent with other cases permitting prisoners to bring § 1983 challenges to prison administrative decisions. See, *e. g.*, *Wolff*, *supra*, at 554–555; *Muhammad*, 540 U. S., at 754; see also *ibid.* (rejecting "the mistaken view . . . that *Heck* applies categorically to all suits challenging prison disciplinary proceedings"). Indeed, this Court has repeatedly permitted prisoners to bring § 1983 actions challenging the conditions of their confinement—conditions that, were Ohio right, might be considered part of the "sentence." See, *e. g.*, *Cooper* v. *Pate*, 378 U. S. 546 (1964) *(per curiam)*; *Wilwording* v. *Swenson*, 404 U. S. 249, 251 (1971) *(per curiam)*. And this interpretation of *Heck* is consistent with *Balisok*, where the Court held the prisoner's suit *Heck*-barred not because it sought nullification of the disciplinary procedures but rather because nullification of the disciplinary procedures would lead necessarily to restoration of good-time credits and hence the shortening of the prisoner's sentence. 520 U. S., at 646.

Second, Ohio says that a decision in favor of respondents would break faith with principles of federal/state comity by opening the door to federal court without prior exhaustion of state-court remedies. Our earlier cases, however, have already placed the States' important comity considerations in the balance, weighed them against the competing need to vindicate federal rights without exhaustion, and concluded that prisoners may bring their claims without fully exhausting state-court remedies so long as their suits, if established, would not necessarily invalidate state-imposed confinement. See Part II, *supra*. Thus, we see no reason for moving the line these cases draw—particularly since Congress has already strengthened the requirement that prisoners exhaust state administrative remedies as a precondition to any § 1983 action. See 42 U. S. C. § 1997e(a); *Porter* v. *Nussle*, 534 U. S. 516, 524 (2002).

For these reasons, the Sixth Circuit's judgment is affirmed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

I join the Court's opinion, which in my view reads *Heck* v. *Humphrey*, 512 U. S. 477 (1994), and *Edwards* v. *Balisok*, 520 U. S. 641 (1997), correctly. And I am in full agreement with the Court's holding that "[b]ecause neither prisoner's claim would necessarily spell speedier release, neither lies at 'the core of habeas corpus' " and both may be brought under Rev. Stat. § 1979, 42 U. S. C. § 1983. *Ante*, at 82. I write separately to note that a contrary holding would require us to broaden the scope of habeas relief beyond recognition.

*Preiser* v. *Rodriguez*, 411 U. S. 475 (1973), and the cases that follow it hold that Congress, in enacting § 1983, preserved the habeas corpus statute as the sole authorization for challenges to allegedly unlawful confinement. *Id.*, at 489–490. At the time of § 1983's adoption, the federal habeas statute mirrored the common-law writ of habeas corpus, in that it authorized a single form of relief: the prisoner's immediate release from custody. See Act of Feb. 5, 1867, § 1, 14 Stat. 386. Congress shortly thereafter amended the statute, authorizing federal habeas courts to "dispose of the party as law and justice require," Rev. Stat. § 761. The statute reads virtually the same today, 28 U. S. C. § 2243 ("dispose of the matter as law and justice require"). We have interpreted this broader remedial language to permit relief short of release. For example, when a habeas petitioner challenges only one of several consecutive sentences, the court may invalidate the challenged sentence even though the prisoner remains in custody to serve the others. See *Peyton* v. *Rowe*, 391 U. S. 54, 67 (1968); *Walker* v. *Wainwright*, 390 U. S. 335, 336–337 (1968) *(per cu-*

*riam).* Thus, in *Preiser* we held the prisoners' § 1983 action barred because the relief it sought—restoration of good-time credits, which would shorten the prisoners' incarceration and hasten the date on which they would be transferred to supervised release—was available in habeas. See 411 U. S., at 487–488.

It is one thing to say that permissible habeas relief, as our cases interpret the statute, includes ordering a "quantum change in the level of custody," *Graham* v. *Broglin*, 922 F. 2d 379, 381 (CA7 1991) (Posner, J.), such as release from incarceration to parole. It is quite another to say that the habeas statute authorizes federal courts to order relief that neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody. That is what is sought here: the mandating of a new parole hearing that may or may not result in release, prescription of the composition of the hearing panel, and specification of the procedures to be followed. A holding that this sort of judicial immersion in the administration of discretionary parole lies at the "core of habeas" would utterly sever the writ from its common-law roots. Cf. *Bell* v. *Wolfish*, 441 U. S. 520, 526, n. 6 (1979) (treating as open the question whether prison-conditions claims are cognizable in habeas). The dissent suggests that because a habeas court may issue a conditional writ ordering a prisoner released unless the State conducts a new *sentencing* proceeding, the court may also issue a conditional writ ordering release absent a new *parole* proceeding. See *post*, at 88–91 (opinion of KENNEDY, J.). But the prisoner who shows that his sentencing was unconstitutional is actually entitled to release, because the judgment pursuant to which he is confined has been invalidated; the conditional writ serves only to "delay the release . . . in order to provide the State an opportunity to correct the constitutional violation." *Hilton* v. *Braunskill*, 481 U. S. 770, 775 (1987); see *In re Bonner*, 151 U. S. 242, 259, 262 (1894) (conditional writ for proper resentencing). By contrast, the val-

idly sentenced prisoner who shows only that the State made a procedural error in denying discretionary parole has *not* established a right to release, and so cannot obtain habeas relief—conditional or otherwise. Conditional writs enable habeas courts to give States time to replace an invalid judgment with a valid one, and the consequence when they fail to do so is always release. Conditional writs are not an all-purpose weapon with which federal habeas courts can extort from the respondent custodian forms of relief short of release, whether a new parole hearing or a new mattress in the applicant's cell.

Petitioners counter that we need not be concerned about this expansion of habeas relief because prisoners will naturally prefer § 1983 to habeas corpus, in light of the burdensome prerequisites attached to habeas relief by 28 U. S. C. § 2254. But those prerequisites, such as exhaustion of state remedies, reliance on "clearly established Federal law," and deference to previous findings of fact, apply only to "a person in custody pursuant to the judgment of a State court," §§ 2254(b)(1), (d)(1), (e)(1). By contrast, § 2243's delineation of the scope of permissible relief applies to *all* federal habeas proceedings, whether the petitioner is in federal or state custody, see § 2241(c). Thus, while § 2254 may shield petitioners and their fellow state wardens from the impact of the broadened writ they urge us to create, not every warden responding to a habeas petition can claim the same protection. And federal prisoners, whose custodians are not acting under color of state law and hence cannot be sued under § 1983, have greater incentives to shoehorn their claims into habeas.

Finally, I note that the Court's opinion focuses correctly on whether the claims respondents pleaded were claims that may be pursued in habeas—not on whether respondents can be successful in obtaining habeas relief on those claims. See, *e. g.*, *ante*, at 80–81. Thus, for example, a prisoner who wishes to challenge the length of his confinement, but who cannot obtain federal habeas relief because of the statute

of limitations or the restrictions on successive petitions, §§ 2244(a), (b), (d), cannot use the unavailability of federal habeas relief in his individual case as grounds for proceeding under § 1983. Cf. *Preiser, supra*, at 489–490 ("It would wholly frustrate explicit congressional intent to hold that [state prisoners] could evade [the exhaustion] requirement by the simple expedient of putting a different label on their pleadings").

With these observations, I join the Court's opinion.

JUSTICE KENNEDY, dissenting.

In this case, the Court insists that an attack on parole proceedings brought under Rev. Stat. § 1979, 42 U. S. C. § 1983, may not be dismissed on the grounds that habeas corpus is the exclusive remedy for such claims. The primary reason offered for the Court's holding is that an order entitling a prisoner to a new parole proceeding might not result in his early release. That reason, however, applies with equal logic and force to a sentencing proceeding. And since it is elementary that habeas is the appropriate remedy for challenging a sentence, something must be quite wrong with the Court's own first premise.

Everyone knows that when a prisoner succeeds in a habeas action and obtains a new sentencing hearing, the sentence may or may not be reduced. The sentence can end up being just the same, or perhaps longer. The prisoner's early release is by no means assured simply because the first sentence was found unlawful. Yet no one would say that an attack on judicial sentencing proceedings following conviction may be raised through an action under § 1983. The inconsistency in the Court's treatment of sentencing proceedings and parole proceedings is thus difficult to justify. It is, furthermore, in tension with our precedents. For these reasons, I write this respectful dissent.

Challenges to parole proceedings are cognizable in habeas. Here respondents challenge parole determinations that not

only deny release (or eligibility for consideration for release) but also guarantee continued confinement until the next scheduled parole proceeding. See *ante*, at 76–77 (majority opinion). If a parole determination is made in a proceeding flawed by errors of constitutional dimensions, as these respondents now allege, their continued confinement may well be the result of constitutional violation. Respondents thus raise a cognizable habeas claim of being "in custody in violation of the Constitution." 28 U. S. C. § 2241(c)(3); see also 1 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 9.1, pp. 431–437, and n. 33 (4th ed. 2001) (noting that "[t]he range of claims cognizable in federal habeas corpus" includes challenges to "the duration of sentence (including on the basis of parole, good time, and other prison- or administratively, as opposed to court-administered rules)" and citing numerous cases to that effect). In recognition of this elementary principle, this Court and the courts of appeals have adjudicated the merits of many parole challenges in federal habeas corpus proceedings. See, *e. g.*, *California Dept. of Corrections* v. *Morales*, 514 U. S. 499 (1995); *Mickens-Thomas* v. *Vaughn*, 321 F. 3d 374 (CA3 2003); *Nulph* v. *Faatz*, 27 F. 3d 451 (CA9 1994) *(per curiam)*; *Fender* v. *Thompson*, 883 F. 2d 303 (CA4 1989).

My concerns with the Court's holding are increased, not diminished, by the fact that the Court does not seem to deny that respondents' claims indeed could be cognizable in habeas corpus proceedings. JUSTICE SCALIA's concurring opinion suggests otherwise, because respondents seek a form of relief (new parole hearings) unavailable in habeas. *Ante*, at 86–87. But the common practice of granting a conditional writ—ordering that a State release the prisoner or else correct the constitutional error through a new hearing—already allows a habeas court to compel the type of relief JUSTICE SCALIA supposes to be unavailable. See *Hilton* v. *Braunskill*, 481 U. S. 770, 775 (1987) ("Federal habeas corpus practice, as reflected by the decisions of this Court, indicates that

a court has broad discretion in conditioning a judgment granting habeas relief").

Because habeas is available for parole challenges like respondents', *Preiser* v. *Rodriguez*, 411 U. S. 475 (1973), thus requires a holding that it also provides the exclusive vehicle for them. In *Preiser*, the Court held that challenges to "the very fact or duration of [a prisoner's] confinement," as opposed to "the conditions of . . . prison life," must be brought in habeas, not under 42 U. S. C. § 1983. 411 U. S., at 499–500. The language of § 1983, to be sure, is capacious enough to include a challenge to the fact or duration of confinement; *Preiser*, nonetheless, established that because habeas is the most specific applicable remedy it should be the exclusive means for raising the challenge. *Id.*, at 489. Respondents' challenges to adverse parole system determinations relate not at all to conditions of confinement but rather to the fact and duration of confinement. See *Butterfield* v. *Bail*, 120 F. 3d 1023, 1024 (CA9 1997) ("[A] challenge to the procedures used in the denial of parole necessarily implicates the validity of the denial of parole and, therefore, the prisoner's continuing confinement"). Straightforward application of *Preiser* and the cases after it would yield the conclusion that these claims must be brought in habeas.

The majority's contrary holding, permitting parole determination challenges to go forward under § 1983, is not based on any argument that these claims should be characterized as challenges to conditions of confinement rather than to its fact or duration. That argument is unavailable to the Court. The majority must say instead that respondents' claims do not fall into the "'core of habeas.'" *Ante*, at 82. For this, it gives two reasons.

The first is that success on the claims will not necessarily entitle respondents to immediate release. *Ibid.* This, as noted at the very outset, proves far too much. If the Court's line of reasoning is sound, it would remove from the

"core of habeas" any challenge to an unconstitutional sentencing procedure.

The second reason, that success on the claims does not necessarily imply the invalidity of respondents' convictions or sentences, *ibid.*, is both misplaced and irrelevant. It is misplaced, because it takes out of context the test employed in *Heck* v. *Humphrey*, 512 U. S. 477 (1994), and in *Edwards* v. *Balisok*, 520 U. S. 641 (1997). In both those cases there was a temptation to seek only relief unavailable in habeas, such as damages (and declaratory relief serving as a predicate to damages), and thus to do an end run around *Preiser*. *Heck*, *supra*, at 481; *Balisok*, *supra*, at 643–644; see also *Muhammad* v. *Close*, 540 U. S. 749 (2004) *(per curiam)* (recognizing that damages are unavailable in habeas). Today's case does not present that problem. The fact that respondents' claims do not impugn the validity of their convictions or sentences is also irrelevant. True, respondents' contentions have nothing to do with their original state-court convictions or sentencing determinations. Stating this fact, however, gets the Court no closer to resolving whether parole determinations themselves are subject to direct challenge only in habeas. That is why we have held that administrative decisions denying good-time credits are subject to attack only in habeas. *Preiser*, *supra*, at 477, 500; *Balisok*, *supra*, at 643–644.

The Court makes it a point to cite a sentence fragment from *Close*, observing that "'the incarceration that matters under *Heck* is the incarceration ordered by the original judgment of conviction,'" *ante*, at 83 (quoting 540 U. S., at 751, n. 1). That statement, however, is inapplicable even on its own terms, because it addresses the *Heck* problem, not this one. Furthermore, even apart from *Heck*'s inapplicability to this case, the full sentence from which the majority takes the quotation makes clear that the Court in *Close* was contrasting confinement *per se* with "special disciplinary con-

finement for infraction of prison rules," 540 U. S., at 751, n. 1. That simply is not at issue here. In sum, neither of the majority's stated principles can justify its deviation from the holding *Preiser* demands.

Today's ruling blurs the *Preiser* formulation. It is apparent that respondents' challenges relate not at all to conditions of confinement but solely to its duration. Notwithstanding *Preiser*'s direction that challenges to the fact or duration of confinement should be restricted to habeas, the Court's decision will allow numerous § 1983 challenges to state parole system determinations that do relate solely to the duration of the prisoners' confinement.

It is unsurprising, then, that 18 States have filed an *amicus* brief joining with Ohio in urging the opposite result, see Brief for Alabama et al. as *Amici Curiae*. Today's decision allows state prisoners raising parole challenges to circumvent the state courts. Compare 28 U. S. C. § 2254(b)(1)(A) (providing that a person in custody pursuant to a state-court judgment must in general exhaust all "remedies available in the courts of the State" before seeking federal habeas relief) with 42 U. S. C. § 1997e(a) (requiring only that a prisoner exhaust administrative remedies before bringing a § 1983 action to challenge "prison conditions"). Parole systems no doubt have variations from State to State. It is within the special province and expertise of the state courts to address challenges to their own state parole determinations in the first instance, particularly because many challenges raise state procedural questions. Today the Court, over the objection of many States, deprives the federal courts of the invaluable assistance and frontline expertise found in the state courts.

For the reasons given above, I would reverse.

Syllabus

# MUEHLER ET AL. *v.* MENA

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03–1423. Argued December 8, 2004—Decided March 22, 2005

Respondent Mena and others were detained in handcuffs during a search of the premises they occupied. Petitioners were lead members of a police detachment executing a search warrant of these premises for, *inter alia*, deadly weapons and evidence of gang membership. Mena sued the officers under 42 U. S. C. § 1983, and the District Court found in her favor. The Ninth Circuit affirmed, holding that the use of handcuffs to detain Mena during the search violated the Fourth Amendment and that the officers' questioning of Mena about her immigration status during the detention constituted an independent Fourth Amendment violation.

*Held:*

1. Mena's detention in handcuffs for the length of the search did not violate the Fourth Amendment. That detention is consistent with *Michigan* v. *Summers*, 452 U. S. 692, 705, in which the Court held that officers executing a search warrant for contraband have the authority "to detain the occupants of the premises while a proper search is conducted." The Court there noted that minimizing the risk of harm to officers is a substantial justification for detaining an occupant during a search, *id.*, at 702–703, and ruled that an officer's authority to detain incident to a search is categorical and does not depend on the "quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure," *id.*, at 705, n. 19. Because a warrant existed to search the premises and Mena was an occupant of the premises at the time of the search, her detention for the duration of the search was reasonable under *Summers*. Inherent in *Summers*' authorization to detain is the authority to use reasonable force to effectuate the detention. See *Graham* v. *Connor*, 490 U. S. 386, 396. The use of force in the form of handcuffs to detain Mena was reasonable because the governmental interest in minimizing the risk of harm to both officers and occupants, at its maximum when a warrant authorizes a search for weapons and a wanted gang member resides on the premises, outweighs the marginal intrusion. See *id.*, at 396–397. Moreover, the need to detain multiple occupants made the use of handcuffs all the more reasonable. Cf. *Maryland* v. *Wilson*, 519 U. S. 408, 414. Although the duration of a detention can affect the balance of interests, the 2- to 3-hour detention

Syllabus

in handcuffs in this case does not outweigh the government's continuing safety interests. Pp. 98–100.

2. The officers' questioning of Mena about her immigration status during her detention did not violate her Fourth Amendment rights. The Ninth Circuit's holding to the contrary appears premised on the assumption that the officers were required to have independent reasonable suspicion in order to so question Mena. However, this Court has "held repeatedly that mere police questioning does not constitute a seizure." *Florida* v. *Bostick*, 501 U. S. 429, 434. Because Mena's initial detention was lawful and the Ninth Circuit did not hold that the detention was prolonged by the questioning, there was no additional seizure within the meaning of the Fourth Amendment, and, therefore, no additional Fourth Amendment justification for inquiring about Mena's immigration status was required. Cf. *Illinois* v. *Caballes*, 543 U. S. 405, 407–408. Pp. 100–101.

3. Because the Ninth Circuit did not address Mena's alternative argument that her detention extended beyond the time the police completed the tasks incident to the search, this Court declines to address it. See, *e. g.*, *Pierce County* v. *Guillen*, 537 U. S. 129, 148, n. 10. P. 102.

332 F. 3d 1255, vacated and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. KENNEDY, J., filed a concurring opinion, *post*, p. 102. STEVENS, J., filed an opinion concurring in the judgment, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post*, p. 104.

*Carter G. Phillips* argued the cause for petitioners. With him on the briefs were *Joseph R. Guerra* and *David H. Hirsch.*

*Kannon K. Shanmugam* argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Clement, Assistant Attorney General Wray,* and *Deputy Solicitor General Dreeben.*

*Paul L. Hoffman* argued the cause for respondent. With him on the brief were *Benjamin Schonbrun, Michael S. Morrison,* and *Erwin Chemerinsky.**

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**Richard Ruda* and *James I. Crowley* filed a brief for the National League of Cities et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Mark D. Rosenbaum, Ahilan T. Arulanan-*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Iris Mena was detained in handcuffs during a search of the premises that she and several others occupied. Petitioners were lead members of a police detachment executing a search warrant of these premises. She sued the officers under Rev. Stat. § 1979, 42 U. S. C. § 1983, and the District Court found in her favor. The Court of Appeals affirmed the judgment, holding that the use of handcuffs to detain Mena during the search violated the Fourth Amendment and that the officers' questioning of Mena about her immigration status during the detention constituted an independent Fourth Amendment violation. *Mena* v. *Simi Valley*, 332 F. 3d 1255 (CA9 2003). We hold that Mena's detention in handcuffs for the length of the search was consistent with our opinion in *Michigan* v. *Summers*, 452 U. S. 692 (1981), and that the officers' questioning during that detention did not violate her Fourth Amendment rights.

* * *

Based on information gleaned from the investigation of a gang-related, driveby shooting, petitioners Muehler and Brill had reason to believe at least one member of a gang—the West Side Locos—lived at 1363 Patricia Avenue. They also suspected that the individual was armed and dangerous, since he had recently been involved in the driveby shooting. As a result, Muehler obtained a search warrant for 1363 Patricia Avenue that authorized a broad search of the house and premises for, among other things, deadly weapons and

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*tham, Steven R. Shapiro, Lucas Guttentag,* and *Lee Gelernt;* and for the National Association of Criminal Defense Lawyers by *Henk Brands* and *Pamela Harris.*

Briefs of *amici curiae* were filed for the National Latino Officers Association et al. by *Baher Azmy, Lawrence S. Lustberg,* and *Jonathan L. Hafetz;* and for the Police Officers Research Association of California Legal Defense Fund et al. by *Michael J. Hansen.*

evidence of gang membership. In light of the high degree of risk involved in searching a house suspected of housing at least one, and perhaps multiple, armed gang members, a Special Weapons and Tactics (SWAT) team was used to secure the residence and grounds before the search.

At 7 a.m. on February 3, 1998, petitioners, along with the SWAT team and other officers, executed the warrant. Mena was asleep in her bed when the SWAT team, clad in helmets and black vests adorned with badges and the word "POLICE," entered her bedroom and placed her in handcuffs at gunpoint. The SWAT team also handcuffed three other individuals found on the property. The SWAT team then took those individuals and Mena into a converted garage, which contained several beds and some other bedroom furniture. While the search proceeded, one or two officers guarded the four detainees, who were allowed to move around the garage but remained in handcuffs.

Aware that the West Side Locos gang was composed primarily of illegal immigrants, the officers had notified the Immigration and Naturalization Service (INS) that they would be conducting the search, and an INS officer accompanied the officers executing the warrant. During their detention in the garage, an officer asked for each detainee's name, date of birth, place of birth, and immigration status. The INS officer later asked the detainees for their immigration documentation. Mena's status as a permanent resident was confirmed by her papers.

The search of the premises yielded a .22 caliber handgun with .22 caliber ammunition, a box of .25 caliber ammunition, several baseball bats with gang writing, various additional gang paraphernalia, and a bag of marijuana. Before the officers left the area, Mena was released.

In her § 1983 suit against the officers she alleged that she was detained "for an unreasonable time and in an unreasonable manner" in violation of the Fourth Amendment. App.

19. In addition, she claimed that the warrant and its execution were overbroad, that the officers failed to comply with the "knock and announce" rule, and that the officers had needlessly destroyed property during the search. The officers moved for summary judgment, asserting that they were entitled to qualified immunity, but the District Court denied their motion. The Court of Appeals affirmed that denial, *except* for Mena's claim that the warrant was overbroad; on this claim the Court of Appeals held that the officers were entitled to qualified immunity. *Mena* v. *Simi Valley*, 226 F. 3d 1031 (CA9 2000). After a trial, a jury, pursuant to a special verdict form, found that Officers Muehler and Brill violated Mena's Fourth Amendment right to be free from unreasonable seizures by detaining her both with force greater than that which was reasonable and for a longer period than that which was reasonable. The jury awarded Mena $10,000 in actual damages and $20,000 in punitive damages against each petitioner for a total of $60,000.

The Court of Appeals affirmed the judgment on two grounds. 332 F. 3d 1255 (CA9 2003). Reviewing the denial of qualified immunity *de novo*, *id.*, at 1261, n. 2, it first held that the officers' detention of Mena violated the Fourth Amendment because it was objectively unreasonable to confine her in the converted garage and keep her in handcuffs during the search, *id.*, at 1263–1264. In the Court of Appeals' view, the officers should have released Mena as soon as it became clear that she posed no immediate threat. *Id.*, at 1263. The court additionally held that the questioning of Mena about her immigration status constituted an independent Fourth Amendment violation. *Id.*, at 1264–1266. The Court of Appeals went on to hold that those rights were clearly established at the time of Mena's questioning, and thus the officers were not entitled to qualified immunity. *Id.*, at 1266–1267. We granted certiorari, 542 U. S. 903 (2004), and now vacate and remand.

* * *

In *Michigan* v. *Summers*, 452 U. S. 692 (1981), we held that officers executing a search warrant for contraband have the authority "to detain the occupants of the premises while a proper search is conducted." *Id.*, at 705. Such detentions are appropriate, we explained, because the character of the additional intrusion caused by detention is slight and because the justifications for detention are substantial. *Id.*, at 701–705. We made clear that the detention of an occupant is "surely less intrusive than the search itself," and the presence of a warrant assures that a neutral magistrate has determined that probable cause exists to search the home. *Id.*, at 701. Against this incremental intrusion, we posited three legitimate law enforcement interests that provide substantial justification for detaining an occupant: "preventing flight in the event that incriminating evidence is found"; "minimizing the risk of harm to the officers"; and facilitating "the orderly completion of the search," as detainees' "self-interest may induce them to open locked doors or locked containers to avoid the use of force." *Id.*, at 702–703.

Mena's detention was, under *Summers*, plainly permissible.[1] An officer's authority to detain incident to a search is categorical; it does not depend on the "quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure." *Id.*, at 705, n. 19. Thus, Mena's detention for the duration of the search was reasonable under *Summers* because a warrant existed to search 1363 Patricia Avenue and she was an occupant of that address at the time of the search.

Inherent in *Summers*' authorization to detain an occupant of the place to be searched is the authority to use reasonable

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[1] In determining whether a Fourth Amendment violation occurred we draw all reasonable factual inferences in favor of the jury verdict, but as we made clear in *Ornelas* v. *United States*, 517 U. S. 690, 697–699 (1996), we do not defer to the jury's legal conclusion that those facts violate the Constitution.

force to effectuate the detention. See *Graham* v. *Connor*, 490 U. S. 386, 396 (1989) ("Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it"). Indeed, *Summers* itself stressed that the risk of harm to officers and occupants is minimized "if the officers routinely exercise unquestioned command of the situation." 452 U. S., at 703.

The officers' use of force in the form of handcuffs to effectuate Mena's detention in the garage, as well as the detention of the three other occupants, was reasonable because the governmental interests outweigh the marginal intrusion. See *Graham*, *supra*, at 396–397. The imposition of correctly applied handcuffs on Mena, who was already being lawfully detained during a search of the house, was undoubtedly a separate intrusion in addition to detention in the converted garage.[2] The detention was thus more intrusive than that which we upheld in *Summers*. See 452 U. S., at 701–702 (concluding that the additional intrusion in the form of a detention was less than that of the warrant-sanctioned search); *Maryland* v. *Wilson*, 519 U. S. 408, 413–414 (1997) (conclud-

[2] In finding the officers should have released Mena from the handcuffs, the Court of Appeals improperly relied upon the fact that the warrant did not include Mena as a suspect. See *Mena* v. *Simi Valley*, 332 F. 3d 1255, 1263, n. 5 (CA9 2003). The warrant was concerned not with individuals but with locations and property. In particular, the warrant in this case authorized the search of 1363 Patricia Avenue and its surrounding grounds for, among other things, deadly weapons and evidence of street gang membership. In this respect, the warrant here resembles that at issue in *Michigan* v. *Summers*, 452 U. S. 692 (1981), which allowed the search of a residence for drugs without mentioning any individual, including the owner of the home whom police ultimately arrested. See *People* v. *Summers*, 407 Mich. 432, 440–443, 286 N. W. 2d 226, 226–227 (1979), rev'd, *Michigan* v. *Summers*, *supra*. *Summers* makes clear that when a neutral magistrate has determined police have probable cause to believe contraband exists, "[t]he connection of an occupant to [a] home" alone "justifies a detention of that occupant." 452 U. S., at 703–704.

ing that the additional intrusion from ordering passengers out of a car, which was already stopped, was minimal).

But this was no ordinary search. The governmental interests in not only detaining, but using handcuffs, are at their maximum when, as here, a warrant authorizes a search for weapons and a wanted gang member resides on the premises. In such inherently dangerous situations, the use of handcuffs minimizes the risk of harm to both officers and occupants. Cf. *Summers*, *supra*, at 702–703 (recognizing the execution of a warrant to search for drugs "may give rise to sudden violence or frantic efforts to conceal or destroy evidence"). Though this safety risk inherent in executing a search warrant for weapons was sufficient to justify the use of handcuffs, the need to detain multiple occupants made the use of handcuffs all the more reasonable. Cf. *Maryland* v. *Wilson*, *supra*, at 414 (noting that "danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car").

Mena argues that, even if the use of handcuffs to detain her in the garage was reasonable as an initial matter, the duration of the use of handcuffs made the detention unreasonable. The duration of a detention can, of course, affect the balance of interests under *Graham*. However, the 2- to 3-hour detention in handcuffs in this case does not outweigh the government's continuing safety interests. As we have noted, this case involved the detention of four detainees by two officers during a search of a gang house for dangerous weapons. We conclude that the detention of Mena in handcuffs during the search was reasonable.

The Court of Appeals also determined that the officers violated Mena's Fourth Amendment rights by questioning her about her immigration status during the detention. 332 F. 3d, at 1264–1266. This holding, it appears, was premised on the assumption that the officers were required to have independent reasonable suspicion in order to question Mena concerning her immigration status because the questioning

constituted a discrete Fourth Amendment event. But the premise is faulty. We have "held repeatedly that mere police questioning does not constitute a seizure." *Florida* v. *Bostick*, 501 U. S. 429, 434 (1991); see also *INS* v. *Delgado*, 466 U. S. 210, 212 (1984). "[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage." *Bostick*, *supra*, at 434–435 (citations omitted). As the Court of Appeals did not hold that the detention was prolonged by the questioning, there was no additional seizure within the meaning of the Fourth Amendment. Hence, the officers did not need reasonable suspicion to ask Mena for her name, date and place of birth, or immigration status.

Our recent opinion in *Illinois* v. *Caballes*, 543 U. S. 405 (2005), is instructive. There, we held that a dog sniff performed during a traffic stop does not violate the Fourth Amendment. We noted that a lawful seizure "can become unlawful if it is prolonged beyond the time reasonably required to complete that mission," but accepted the state court's determination that the duration of the stop was not extended by the dog sniff. *Id.*, at 407. Because we held that a dog sniff was not a search subject to the Fourth Amendment, we rejected the notion that "the shift in purpose" "from a lawful traffic stop into a drug investigation" was unlawful because it "was not supported by any reasonable suspicion." *Id.*, at 408. Likewise here, the initial *Summers* detention was lawful; the Court of Appeals did not find that the questioning extended the time Mena was detained. Thus no additional Fourth Amendment justification for inquiring about Mena's immigration status was required.[3]

[3] The Court of Appeals' reliance on *United States* v. *Brignoni-Ponce*, 422 U. S. 873 (1975), is misplaced. *Brignoni-Ponce* held that stops by roving patrols near the border "may be justified on facts that do not amount to

In summary, the officers' detention of Mena in handcuffs during the execution of the search warrant was reasonable and did not violate the Fourth Amendment. Additionally, the officers' questioning of Mena did not constitute an independent Fourth Amendment violation. Mena has advanced in this Court, as she did before the Court of Appeals, an alternative argument for affirming the judgment below. She asserts that her detention extended beyond the time the police completed the tasks incident to the search. Because the Court of Appeals did not address this contention, we too decline to address it. See *Pierce County* v. *Guillen*, 537 U. S. 129, 148, n. 10 (2003); *National Collegiate Athletic Assn.* v. *Smith*, 525 U. S. 459, 469–470 (1999).

The judgment of the Court of Appeals is therefore vacated, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE KENNEDY, concurring.

I concur in the judgment and in the opinion of the Court. It does seem important to add this brief statement to help ensure that police handcuffing during searches becomes neither routine nor unduly prolonged.

The safety of the officers and the efficacy of the search are matters of first concern, but so too is it a matter of first concern that excessive force is not used on the persons detained, especially when these persons, though lawfully detained under *Michigan* v. *Summers*, 452 U. S. 692 (1981), are not themselves suspected of any involvement in criminal

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the probable cause require[ment] for an arrest." *Id.*, at 880. We considered only whether the patrols had the "authority to *stop* automobiles in areas near the Mexican border," *id.*, at 874 (emphasis added), and expressed no opinion as to the appropriateness of questioning when an individual was already seized. See *United States* v. *Martinez-Fuerte*, 428 U. S. 543, 556–562 (1976). We certainly did not, as the Court of Appeals suggested, create a "requirement of particularized reasonable suspicion for purposes of inquiry into citizenship status." 332 F. 3d, at 1267.

activity. The use of handcuffs is the use of force, and such force must be objectively reasonable under the circumstances, *Graham* v. *Connor*, 490 U. S. 386 (1989).

The reasonableness calculation under *Graham* is in part a function of the expected and actual duration of the search. If the search extends to the point when the handcuffs can cause real pain or serious discomfort, provision must be made to alter the conditions of detention at least long enough to attend to the needs of the detainee. This is so even if there is no question that the initial handcuffing was objectively reasonable. The restraint should also be removed if, at any point during the search, it would be readily apparent to any objectively reasonable officer that removing the handcuffs would not compromise the officers' safety or risk interference or substantial delay in the execution of the search. The time spent in the search here, some two to three hours, certainly approaches, and may well exceed, the time beyond which a detainee's Fourth Amendment interests require revisiting the necessity of handcuffing in order to ensure the restraint, even if permissible as an initial matter, has not become excessive.

That said, under these circumstances I do not think handcuffing the detainees for the duration of the search was objectively unreasonable. As I understand the record, during much of this search 2 armed officers were available to watch over the 4 unarmed detainees, while the other 16 officers on the scene conducted an extensive search of a suspected gang safe house. Even if we accept as true—as we must—the factual assertions that these detainees posed no readily apparent danger and that keeping them handcuffed deviated from standard police procedure, it does not follow that the handcuffs were unreasonable. Where the detainees outnumber those supervising them, and this situation could not be remedied without diverting officers from an extensive, complex, and time-consuming search, the continued use of handcuffs after the initial sweep may be justified, subject to

adjustments or temporary release under supervision to avoid pain or excessive physical discomfort. Because on this record it does not appear the restraints were excessive, I join the opinion of the Court.

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, concurring in the judgment.

The jury in this case found that the two petitioners violated Iris Mena's Fourth Amendment right to be free from unreasonable seizure by detaining her with greater force and for a longer period of time than was reasonable under the circumstances. In their post-trial motion in the District Court, petitioners advanced three legal arguments: (1) They were entitled to qualified immunity because the unconstitutionality of their conduct was not clearly established;[1] (2) the judge's instruction to the jury was erroneous;[2] and (3) the evidence was not sufficient to support the jury's award of

[1] The Court of Appeals' conclusion that the officers were not entitled to qualified immunity was not challenged in the petition for certiorari and is therefore waived. See *Taylor* v. *Freeland & Kronz*, 503 U. S. 638, 645–646 (1992).

[2] The trial judge instructed the jury as follows:

"'Generally, a police officer carrying out a search authorized by a warrant may detain occupants of the residence during the search, so long as the detention is reasonable.

"'In determining the reasonableness of a detention conducted in connection with a search, you may look to all the circumstances, including the severity of the suspected crime, whether the person being detained is the subject of the investigation, whether such person poses an immediate threat to the security of the police or others or to the ability of the police to conduct the search, and whether such person is actively resisting arrest or attempting to flee. A detention may be unreasonable if it is unnecessarily painful, degrading, prolonged or if it involves an undue invasion of privacy. A police officer is required to release an individual detained in connection with a lawful search as soon as the officers' right to conduct the search ends or the search itself is concluded, whichever is sooner.'" *Mena* v. *Simi Valley*, 332 F. 3d 1255, 1267–1268 (CA9 2003) (alterations omitted; one paragraph break added).

punitive damages. The trial judge's thoughtful explanation of his reasons for denying the motion does not address either of the issues the Court discusses today.

In its opinion affirming the judgment, the Court of Appeals made two mistakes. First, as the Court explains, *ante*, at 100–101, it erroneously held that the immigration officers' questioning of Mena about her immigration status was an independent violation of the Fourth Amendment.[3] Second, instead of merely deciding whether there was sufficient evidence in the record to support the jury's verdict, the Court of Appeals appears to have ruled as a matter of law that the officers should have released her from the handcuffs sooner than they did. I agree that it is appropriate to remand the case to enable the Court of Appeals to consider whether the evidence supports Mena's contention that she was held longer than the search actually lasted. In doing so, the Court of Appeals must of course accord appropriate deference to the jury's reasonable factual findings, while applying the correct legal standard. See *Ornelas* v. *United States*, 517 U. S. 690, 699 (1996).

In my judgment, however, the Court's discussion of the amount of force used to detain Mena pursuant to *Michigan* v. *Summers*, 452 U. S. 692 (1981), is analytically unsound. Although the Court correctly purports to apply the "objective reasonableness" test announced in *Graham* v. *Connor*, 490 U. S. 386 (1989), it misapplies that test. Given the facts of this case—and the presumption that a reviewing court must draw all reasonable inferences in favor of supporting the verdict—I think it clear that the jury could properly have found that this 5-foot-2-inch young lady posed no threat to the officers at the scene, and that they used excessive force in keeping her in handcuffs for up to three hours. Although *Summers* authorizes the detention of any individual

[3] While I agree with the Court's discussion of this issue, I note that the issue was not properly presented to the Ninth Circuit because it was not raised by either petitioners or respondent.

who is present when a valid search warrant is being executed, that case does not give officers *carte blanche* to keep individuals who pose no threat in handcuffs throughout a search, no matter how long it may last. On remand, I would therefore instruct the Court of Appeals to consider whether the evidence supports Mena's contention that the petitioners used excessive force in detaining her when it considers the length of the *Summers* detention.

## I

As the Court notes, the warrant in this case authorized the police to enter the Mena home to search for a gun belonging to Raymond Romero that may have been used in a gang-related driveby shooting. Romero, a known member of the West Side Locos gang, rented a room from the Mena family. The house, described as a "'poor house,'" was home to several unrelated individuals who rented from the Menas. Brief for Petitioners 4. Each resident had his or her own bedroom, which could be locked with a padlock on the outside, and each had access to the living room and kitchen. In addition, several individuals lived in trailers in the back yard and also had access to the common spaces in the Mena home. *Id.*, at 5.

In addition to Romero, police had reason to believe that at least one other West Side Locos gang member had lived at the residence, although Romero's brother told police that the individual had returned to Mexico. The officers in charge of the search, petitioners Muehler and Brill, had been at the same residence a few months earlier on an unrelated domestic violence call, but did not see any other individuals they believed to be gang members inside the home on that occasion.

In light of the fact that the police believed that Romero possessed a gun and that there might be other gang members at the residence, petitioner Muehler decided to use a Special Weapons and Tactics (SWAT) team to execute the

warrant. As described in the majority opinion, eight members of the SWAT team forcefully entered the home at 7 a.m. In fact, Mena was the only occupant of the house, and she was asleep in her bedroom. The police woke her up at gunpoint, and immediately handcuffed her. At the same time, officers served another search warrant at the home of Romero's mother, where Romero was known to stay several nights each week. In part because Romero's mother had previously cooperated with police officers, they did not use a SWAT team to serve that warrant. Romero was found at his mother's house; after being cited for possession of a small amount of marijuana, he was released.

Meanwhile, after the SWAT team secured the Mena residence and gave the "all clear," police officers transferred Mena and three other individuals (who had been in trailers in the back yard) to a converted garage.[4] To get to the garage, Mena, who was still in her bedclothes, was forced to walk barefoot through the pouring rain. The officers kept her and the other three individuals in the garage for up to three hours while they searched the home. Although she requested them to remove the handcuffs, they refused to do so. For the duration of the search, two officers guarded Mena and the other three detainees. A .22-caliber handgun, ammunition, and gang-related paraphernalia were found in Romero's bedroom, and other gang-related paraphernalia was found in the living room. Officers found nothing of significance in Mena's bedroom.[5] *Id.*, at 6–9.

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[4] The other individuals were a 55-year-old Latina female, a 40-year-old Latino male who was removed from the scene by the Immigration and Naturalization Service (INS), and a white male who appears to be in his early 30's and who was cited for possession of a small amount of marijuana.

[5] One of the justifications for our decision in *Michigan* v. *Summers*, 452 U. S. 692 (1981), was the fact that the occupants may be willing to "open locked doors or locked containers to avoid the use of force that is not only damaging to property but may also delay the completion of the task at hand." *Id.*, at 703. Mena, however, was never asked to assist the officers, although she testified that she was willing to do so. See 3 Tr. 42

II

In analyzing the quantum of force used to effectuate the *Summers* detention, the Court rightly employs the "objective reasonableness" test of *Graham*. Under *Graham*, the trier of fact must balance "'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." 490 U. S., at 396. The District Court correctly instructed the jury to take into consideration such factors as "'the severity of the suspected crime, whether the person being detained is the subject of the investigation, whether such person poses an immediate threat to the security of the police or others or to the ability of the police to conduct the search, and whether such person is actively resisting arrest or attempting to flee.'" See n. 2, *supra*. The District Court also correctly instructed the jury to consider whether the detention was prolonged and whether Mena was detained in handcuffs after the search had ended. *Ibid.* Many of these factors are taken from *Graham* itself, and the jury instruction reflects an entirely reasonable construction of the objective reasonableness test in the *Summers* context.

Considering those factors, it is clear that the SWAT team's initial actions were reasonable. When officers undertake a dangerous assignment to execute a warrant to search property that is presumably occupied by violence-prone gang members, it may well be appropriate to use both overwhelming force and surprise in order to secure the premises as promptly as possible. In this case the decision to use a SWAT team of eight heavily armed officers and to execute the warrant at 7 a.m. gave the officers maximum protection against the anticipated risk. As it turned out, there was only one person in the house—Mena—and she was sound asleep. Nevertheless, "[t]he 'reasonableness' of a particular

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(June 14, 2001). Instead, officers broke the locks on several cabinets and dressers to which Mena possessed the keys.

use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U. S., at 396. At the time they first encountered Mena, the officers had no way of knowing her relation to Romero, whether she was affiliated with the West Side Locos, or whether she had any weapons on her person. Further, the officers needed to use overwhelming force to immediately take command of the situation; by handcuffing Mena they could more quickly secure her room and join the other officers. It would be unreasonable to expect officers, who are entering what they believe to be a high risk situation, to spend the time necessary to determine whether Mena was a threat before they handcuffed her. To the extent that the Court of Appeals relied on the initial actions of the SWAT team to find that there was sufficient evidence to support the jury's verdict, it was in error.

Whether the well-founded fears that justified the extraordinary entry into the house should also justify a prolonged interruption of the morning routine of a presumptively innocent person, however, is a separate question and one that depends on the specific facts of the case. This is true with respect both to how the handcuffs were used, and to the totality of the circumstances surrounding the detention, including whether Mena was detained in handcuffs after the search had concluded. With regard to the handcuffs, police may use them in different ways.[6] Here, the cuffs kept Mena's arms behind her for two to three hours. She testified that they were "'real uncomfortable'" and that she had asked the officers to remove them, but that they had refused. App. 105. Moreover, she was continuously guarded by two

[6] For instance, a suspect may be handcuffed to a fixed object, to a custodian, or her hands may simply be linked to one another. The cuffs may join the wrists either in the front or the back of the torso. They can be so tight that they are painful, particularly when applied for prolonged periods. While they restrict movement, they do not necessarily preclude flight if the prisoner is not kept under constant surveillance.

police officers who obviously made flight virtually impossible even if the cuffs had been removed.

A jury could reasonably have found a number of facts supporting a conclusion that the prolonged handcuffing was unreasonable. No contraband was found in Mena's room or on her person. There were no indications suggesting she was or ever had been a gang member, which was consistent with the fact that during the police officers' last visit to the home, no gang members were present. She fully cooperated with the officers and the INS agent, answering all their questions. She was unarmed, and given her small size, was clearly no match for either of the two armed officers who were guarding her. In sum, there was no evidence that Mena posed any threat to the officers or anyone else.

The justifications offered by the officers are not persuasive. They have argued that at least six armed officers were required to guard the four detainees, even though all of them had been searched for weapons. Since there were 18 officers at the scene, and since at least 1 officer who at one point guarded Mena and the other three residents was sent home after offering to assist in the search, it seems unlikely that lack of resources was really a problem. While a court should not ordinarily question the allocation of police officers or resources, a jury could have reasonably found that this is a case where ample resources were available.

The jury may also have been skeptical of testimony that the officers in fact feared for their safety given that the actual suspect of the shooting had been found at the other location and promptly released. Additionally, while the officers testified that as a general matter they would not release an individual from handcuffs while searching a residence, the SWAT team's tactical plan for this particular search arguably called for them to do just that, since it directed that "[a]ny subjects encountered will be handcuffed and detained until they can be patted down, their location noted, [field identi-

fied], and released by Officer Muehler or Officer R. Brill." 2 Record 53. The tactical plan suggests that they can, and often do, release individuals who are not related to the search. The SWAT team leader testified that handcuffs are not always required when executing a search.

In short, under the factors listed in *Graham* and those validly presented to the jury in the jury instructions, a jury could have reasonably found from the evidence that there was no apparent need to handcuff Mena for the entire duration of the search and that she was detained for an unreasonably prolonged period. She posed no threat whatsoever to the officers at the scene. She was not suspected of any crime and was not a person targeted by the search warrant. She had no reason to flee the scene and gave no indication that she desired to do so. Viewing the facts in the light most favorable to the jury's verdict, as we are required to do, there is certainly no obvious factual basis for rejecting the jury's verdict that the officers acted unreasonably, and no obvious basis for rejecting the conclusion that, on these facts, the quantum of force used was unreasonable as a matter of law.

## III

Police officers' legitimate concern for their own safety is always a factor that should weigh heavily in balancing the relevant *Graham* factors. But, as Officer Brill admitted at trial, if that justification were always sufficient, it would authorize the handcuffing of every occupant of the premises for the duration of every *Summers* detention. Nothing in either the *Summers* or the *Graham* opinion provides any support for such a result. Rather, the decision of what force to use must be made on a case-by-case basis. There is evidence in this record that may well support the conclusion that it was unreasonable to handcuff Mena throughout the search. On remand, therefore, I would instruct the Ninth Circuit to consider that evidence, as well as the possibility

that Mena was detained after the search was completed, when deciding whether the evidence in the record is sufficient to support the jury's verdict.

Syllabus

# CITY OF RANCHO PALOS VERDES ET AL. *v.* ABRAMS

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03–1601. Argued January 19, 2005—Decided March 22, 2005

After petitioner City denied respondent Abrams permission to construct a radio tower on his property, he filed this action seeking, *inter alia*, injunctive relief under § 332(c)(7)(B)(v) of the Communications Act of 1934, 47 U. S. C. § 332(c)(7), as added by the Telecommunications Act of 1996 (TCA), and money damages under 42 U. S. C. § 1983. Section 332(c)(7) imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of wireless communications facilities, and provides, in § 332(c)(7)(B)(v), that anyone "adversely affected by any final action . . . by [such] a . . . government . . . may . . . commence an action in any court of competent jurisdiction." The District Court held that § 332(c)(7)(B)(v) provided the exclusive remedy for the City's actions and, accordingly, ordered the City to grant respondent's application for a conditional-use permit, but refused respondent's request for damages under § 1983. The Ninth Circuit reversed on the latter point.

*Held:* An individual may not enforce § 332(c)(7)'s limitations on local zoning authority through a § 1983 action. The TCA—by providing a judicial remedy different from § 1983 in § 332(c)(7) itself—precluded resort to § 1983. Pp. 119–127.

(a) Even after a plaintiff demonstrates that a federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs, see *Gonzaga Univ.* v. *Doe*, 536 U. S. 273, 285, the defendant may rebut the presumption that the right is enforceable under § 1983 by, *inter alia*, showing a contrary congressional intent from the statute's creation of a "comprehensive remedial scheme that is inconsistent with individual enforcement under § 1983," *Blessing* v. *Freestone*, 520 U. S. 329, 341. The Court's cases demonstrate that the provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a remedy under § 1983. Pp. 119–120.

(b) Congress could not have meant the judicial remedy expressly authorized by § 332(c)(7) to coexist with an alternative remedy available under § 1983, since enforcement of the former through the latter would distort the scheme of expedited judicial review and limited remedies created by § 332(c)(7)(B)(v). The TCA adds no remedies to those avail-

Syllabus

able under § 1983, and limits relief in ways that § 1983 does not. In contrast to a § 1983 action, TCA judicial review must be sought within 30 days after the governmental entity has taken "final action," and, once the action is filed, the court must "hear and decide" it "on an expedited basis." § 332(c)(7)(B)(v). Moreover, unlike § 1983 remedies, TCA remedies perhaps do not include compensatory damages, and certainly do not include attorney's fees and costs. The Court rejects Abrams's arguments for borrowing § 332(c)(7)(B)(v)'s 30-day limitations period, rather than applying the longer statute of limitations authorized under 42 U. S. C. § 1988 or 28 U. S. C. § 1658, in § 1983 actions asserting § 332(c)(7)(B) violations. Pp. 120–125.

(c) In concluding that Congress intended to permit plaintiffs to proceed under § 1983, the Ninth Circuit misinterpreted the TCA's so-called "saving clause," which provides: "This Act . . . shall not be construed to . . . impair . . . Federal . . . law." Construing § 332(c)(7), as this Court does, to create rights that may be enforced only through the statute's express remedy does not "impair" § 1983 because it leaves § 1983's pre-TCA operation entirely unaffected. Pp. 125–127.

354 F. 3d 1094, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, in which O'CONNOR, SOUTER, and GINSBURG, JJ., joined, *post*, p. 127. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 129.

*Jeffrey A. Lamken* argued the cause for petitioners. With him on the briefs were *T. Peter Pierce*, *Gregory M. Kunert*, and *Nicholas P. Miller*.

*James A. Feldman* argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Clement*, *Assistant Attorney General Keisler*, *Deputy Solicitor General Hungar*, and *Thomas M. Bondy*.

*Seth P. Waxman* argued the cause for respondent. With him on the brief were *William T. Lake*, *Jonathan J. Frankel*, *Paul R. Q. Wolfson*, *Brian W. Murray*, *Wilkie Cheong*, *Christopher D. Imlay*, and *David J. Kaufman*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by *Troy King*, Attorney General of Alabama, and *Kevin C. Newsom*, Solicitor General, and by the Attorneys General for their respec-

JUSTICE SCALIA delivered the opinion of the Court.

We decide in this case whether an individual may enforce the limitations on local zoning authority set forth in § 332(c)(7) of the Communications Act of 1934, 47 U. S. C. § 332(c)(7), through an action under Rev. Stat. § 1979, 42 U. S. C. § 1983.

I

Congress enacted the Telecommunications Act of 1996 (TCA), 110 Stat. 56, to promote competition and higher quality in American telecommunications services and to "encourage the rapid deployment of new telecommunications technologies." *Ibid.* One of the means by which it sought to accomplish these goals was reduction of the impediments imposed by local governments upon the installation of facilities for wireless communications, such as antenna towers. To this end, the TCA amended the Communications Act of 1934, 48 Stat. 1064, to include § 332(c)(7), which imposes specific limitations on the traditional authority of state and local governments to regulate the location, construction, and modification of such facilities, 110 Stat. 151, codified at 47 U. S. C.

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tive jurisdictions as follows: *Gregg D. Renkes* of Alaska, *M. Jane Brady* of Delaware, *Douglas B. Moylan* of Guam, *Mark J. Bennett* of Hawaii, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Tom Reilly* of Massachusetts, *Mike McGrath* of Montana, *Jeremiah W. (Jay) Nixon* of Missouri, *Brian Sandoval* of Nevada, *Jim Petro* of Ohio, *Hardy Myers* of Oregon, *Lawrence E. Long* of South Dakota, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, and *Jerry W. Kilgore* of Virginia; for Local Governments et al. by *Roy T. Englert, Jr.*, *Max Huffman*, *James N. Horwood*, and *Peter J. Hopkins;* and for the National League of Cities et al. by *Richard Ruda*, *James I. Crowley*, *Robert A. Long*, and *Heidi C. Doerhoff.*

Briefs of *amici curiae* urging affirmance were filed for the American Mobile Telecommunications Association by *Russell D. Lukas;* for the Cellular Telecommunications & Internet Association by *Andrew G. McBride*, *Joshua S. Turner*, and *Michael Altschul;* for the Lawyers' Committee for Civil Rights Under Law et al. by *Reginald D. Steer* and *Michael L. Foreman;* for Public Citizen, Inc., by *Scott L. Nelson;* and for James A. Kay, Jr., by *Barry Richard.*

§ 332(c)(7). Under this provision, local governments may not "unreasonably discriminate among providers of functionally equivalent services," § 332(c)(7)(B)(i)(I), take actions that "prohibit or have the effect of prohibiting the provision of personal wireless services," § 332(c)(7)(B)(i)(II), or limit the placement of wireless facilities "on the basis of the environmental effects of radio frequency emissions," § 332(c)(7)(B)(iv). They must act on requests for authorization to locate wireless facilities "within a reasonable period of time," § 332(c)(7)(B)(ii), and each decision denying such a request must "be in writing and supported by substantial evidence contained in a written record," § 332(c)(7)(B)(iii). Lastly, § 332(c)(7)(B)(v), which is central to the present case, provides as follows:

> "Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction."

Respondent Mark Abrams owns a home in a low-density, residential neighborhood in the city of Rancho Palos Verdes, California (City). His property is located at a high elevation, near the peak of the Rancho Palos Verdes Peninsula. *Rancho Palos Verdes* v. *Abrams*, 101 Cal. App. 4th 367, 371, 124 Cal. Rptr. 2d 80, 82 (2002). The record reflects that the location is both scenic and, because of its high elevation, ideal for radio transmissions. *Id.*, at 371–372, 124 Cal. Rptr. 2d, at 82–83.

In 1989, respondent obtained a permit from the City to construct a 52.5-foot antenna on his property for amateur use.[1] He installed the antenna shortly thereafter, and in the

[1] The City's approval specified a maximum height of 40 feet, but, because of an administrative error, the permit itself authorized respondent to construct a tower 12.5 feet taller. 354 F. 3d 1094, 1095 (CA9 2004).

years that followed placed several smaller, tripod antennas on the property without prior permission from the City. He used the antennas both for noncommercial purposes (to provide an amateur radio service and to relay signals from other amateur radio operators) and for commercial purposes (to provide customers two-way radio communications from portable and mobile transceivers, and to repeat the signals of customers so as to enable greater range of transmission). *Ibid.*

In 1998, respondent sought permission to construct a second antenna tower. In the course of investigating that application, the City learned that respondent was using his antennas to provide a commercial service, in violation of a City ordinance requiring a "conditional-use permit" from the City Planning Commission (Commission) for commercial antenna use. See Commission Resolution No. 2000–12 ("A Resolution of the Planning Commission of the City of Rancho Palos Verdes Denying With Prejudice Conditional Use Permit No. 207 for the Proposed Commercial Use of Existing Antennae on an Existing Antenna Support Structure, Located at 44 Oceanaire Drive in the *Del Cerro* Neighborhood"), App. to Pet. for Cert. 54a. On suit by the City, Los Angeles County Superior Court enjoined respondent from using the antennas for a commercial purpose. *Rancho Palos Verdes, supra*, at 373, 124 Cal. Rptr. 2d, at 84; App. to Pet. for Cert. 35a.

Two weeks later, in July 1999, respondent applied to the Commission for the requisite conditional-use permit. The application drew strong opposition from several of respondent's neighbors. The Commission conducted two hearings and accepted written evidence, after which it denied the application. *Id.*, at 54a–63a. The Commission explained that granting respondent permission to operate commercially "would perpetuate . . . adverse visual impacts" from respondent's existing antennas and establish precedent for similar projects in residential areas in the future. *Id.*, at 57a. The

Commission also concluded that denial of respondent's application was consistent with 47 U. S. C. § 332(c)(7), making specific findings that its action complied with each of that provision's requirements. App. to Pet. for Cert. 61a–62a. The city council denied respondent's appeal. *Id.*, at 52a. See generally No. CV00–09071–SVW (RNBx) (CD Cal., Jan. 9, 2002), App. to Pet. for Cert. 22a–23a.

On August 24, 2000, respondent filed this action against the City in the District Court for the Central District of California, alleging, as relevant, that denial of the use permit violated the limitations placed on the City's zoning authority by § 332(c)(7). In particular, respondent charged that the City's action discriminated against the mobile relay services he sought to provide, § 332(c)(7)(B)(i)(I), effectively prohibited the provision of mobile relay services, § 332(c)(7)(B)(i)(II), and was not supported by substantial evidence in the record, § 332(c)(7)(B)(iii). App. to Pet. for Cert. 17a. Respondent sought injunctive relief under § 332(c)(7)(B)(v), and money damages and attorney's fees under 42 U. S. C. §§ 1983 and 1988. Plaintiff/Petitioner's Brief Re: Remedies and Damages, Case No. 00–09071–SVW (RNBx) (CD Cal., Feb. 25, 2002), App. to Reply Brief for Petitioners 2a–7a.

Notwithstanding § 332(c)(7)(B)(v)'s direction that courts "hear and decide" actions "on an expedited basis," the District Court did not act on respondent's complaint until January 9, 2002, 16 months after filing; it concluded that the City's denial of a conditional-use permit was not supported by substantial evidence. App. to Pet. for Cert. 23a–26a. The court explained that the City could not rest its denial on esthetic concerns, since the antennas in question were already in existence and would remain in place whatever the disposition of the permit application. *Id.*, at 23a–24a. Nor, the court said, could the City reasonably base its decision on the fear of setting precedent for the location of commercial antennas in residential areas, since adverse impacts from

new structures would always be a basis for permit denial. *Id.*, at 25a. In light of the paucity of support for the City's action, the court concluded that denial of the permit was "an act of spite by the community." *Id.*, at 24a. In an order issued two months later, the District Court held that § 332(c)(7)(B)(v) provided the exclusive remedy for the City's actions. Judgment of Injunction, No. CV00–09071–SVW (RNBx) (CD Cal., Mar. 18, 2002), App. to Pet. for Cert. 14a. Accordingly, it ordered the City to grant respondent's application for a conditional-use permit, but refused respondent's request for damages under § 1983. Respondent appealed.

The Court of Appeals for the Ninth Circuit reversed on the latter point, and remanded for determination of money damages and attorney's fees. 354 F. 3d 1094, 1101 (2004). We granted certiorari. 542 U. S. 965 (2004).

## II

### A

Title 42 U. S. C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

In *Maine* v. *Thiboutot*, 448 U. S. 1 (1980), we held that this section "means what it says" and authorizes suits to enforce individual rights under federal statutes as well as the Constitution. *Id.*, at 4.

Our subsequent cases have made clear, however, that § 1983 does not provide an avenue for relief every time a state actor violates a federal law. As a threshold matter, the text of § 1983 permits the enforcement of "*rights*, not the

broader or vaguer 'benefits' or 'interests.'" *Gonzaga Univ.* v. *Doe*, 536 U. S. 273, 283 (2002) (emphasis in original). Accordingly, to sustain a § 1983 action, the plaintiff must demonstrate that the federal statute creates an individually enforceable right in the class of beneficiaries to which he belongs. See *id.*, at 285.

Even after this showing, "there is only a rebuttable presumption that the right is enforceable under § 1983." *Blessing* v. *Freestone*, 520 U. S. 329, 341 (1997). The defendant may defeat this presumption by demonstrating that Congress did not intend that remedy for a newly created right. See *ibid.*; *Smith* v. *Robinson*, 468 U. S. 992, 1012 (1984). Our cases have explained that evidence of such congressional intent may be found directly in the statute creating the right, or inferred from the statute's creation of a "comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983." *Blessing*, *supra*, at 341.[2] See also *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 19–20 (1981). "The crucial consideration is what Congress intended." *Smith*, *supra*, at 1012.

B

The City conceded below, and neither the City nor the Government as *amicus* disputes here, that § 332(c)(7) creates individually enforceable rights; we assume, *arguendo*, that this is so. The critical question, then, is whether Congress

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[2] This does not contravene the canon against implied repeal, see *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936), because we have held that canon inapplicable to a statute that creates no rights but merely provides a civil cause of action to remedy "some otherwise defined federal right," *Great American Fed. Sav. & Loan Assn.* v. *Novotny*, 442 U. S. 366, 376 (1979) (dealing with a provision related to § 1983, 42 U. S. C. § 1985(3)). In such a case, "we are not faced . . . with a question of implied repeal," but with whether the rights created by a later statute "may be asserted within the *remedial* framework" of the earlier one. *Great American Fed. Sav. & Loan Assn.*, *supra*, at 376–377.

meant the judicial remedy expressly authorized by § 332(c)(7) to coexist with an alternative remedy available in a § 1983 action. We conclude not.

The provision of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983. As we have said in a different setting, "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander* v. *Sandoval*, 532 U. S. 275, 290 (2001). Thus, the existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which we have held that an action would lie under § 1983 and those in which we have held that it would not.

We have found § 1983 unavailable to remedy violations of federal statutory rights in two cases: *Sea Clammers* and *Smith*. Both of those decisions rested upon the existence of more restrictive remedies provided in the violated statute itself. See *Smith*, *supra*, at 1011–1012 (recognizing a § 1983 action "would . . . render superfluous most of the detailed procedural protections outlined in the statute"); *Sea Clammers*, *supra*, at 20 ("[W]hen a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983" (internal quotation marks omitted)). Moreover, in *all* of the cases in which we have held that § 1983 *is* available for violation of a federal statute, we have emphasized that the statute at issue, in contrast to those in *Sea Clammers* and *Smith*, *did not* provide a private judicial remedy (or, in most of the cases, even a private administrative remedy) for the rights violated. See *Blessing*, *supra*, at 348 ("Unlike the federal programs at issue in *[Sea Clammers* and *Smith]*, Title IV–D contains no private remedy—either judicial or administrative—through which aggrieved persons can seek redress"); *Livadas* v. *Bradshaw*, 512 U. S.

107, 133–134 (1994) (there was a "complete absence of provision for relief from governmental interference" in the statute); *Golden State Transit Corp.* v. *Los Angeles*, 493 U. S. 103, 108–109 (1989) ("There is . . . no comprehensive enforcement scheme for preventing state interference with federally protected labor rights that would foreclose the § 1983 remedy"); *Wilder* v. *Virginia Hospital Assn.*, 496 U. S. 498, 521 (1990) ("The Medicaid Act contains no . . . provision for private judicial or administrative enforcement" comparable to those in *Sea Clammers* and *Smith*); *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U. S. 418, 427 (1987) ("In both *Sea Clammers* and *Smith* . . . , the statutes at issue themselves provided for private judicial remedies, thereby evidencing congressional intent to supplant the § 1983 remedy. There is nothing of that kind found in the . . . Housing Act").

The Government as *amicus*, joined by the City, urges us to hold that the availability of a private judicial remedy is not merely indicative of, but conclusively establishes, a congressional intent to preclude § 1983 relief. Brief for United States as *Amicus Curiae* 17; Brief for Petitioners 35. We decline to do so. The ordinary inference that the remedy provided in the statute is exclusive can surely be overcome by textual indication, express or implicit, that the remedy is to complement, rather than supplant, § 1983.

There is, however, no such indication in the TCA, which adds no remedies to those available under § 1983, and limits relief in ways that § 1983 does not. Judicial review of zoning decisions under § 332(c)(7)(B)(v) must be sought within 30 days after the governmental entity has taken "final action," and, once the action is filed, the court must "hear and decide" it "on an expedited basis." § 332(c)(7)(B)(v). The remedies available, moreover, perhaps do not include compensatory damages (the lower courts are seemingly in disagreement on

this point[3]), and certainly do not include attorney's fees and costs.[4] A § 1983 action, by contrast, can be brought much later than 30 days after the final action,[5] and need not be heard and decided on an expedited basis. And the successful plaintiff may recover not only damages but reasonable attorney's fees and costs under 42 U. S. C. § 1988. *Thiboutot*, 448 U. S., at 9. Liability for attorney's fees would have a particularly severe impact in the § 332(c)(7) context, making local governments liable for the (often substantial) legal expenses of large commercial interests for the misapplication of a complex and novel statutory scheme. See *Nextel Partners Inc.* v. *Kingston Township*, 286 F. 3d 687, 695 (CA3

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[3] Compare *Primeco Personal Communications, Ltd. Partnership* v. *Mequon*, 352 F. 3d 1147, 1152–1153 (CA7 2003) (damages are presumptively available), with *Omnipoint Communications MB Operations, LLC* v. *Lincoln*, 107 F. Supp. 2d 108, 120–121 (Mass. 2000) ("[T]he majority of district courts . . . have held that the appropriate remedy for a violation of the TCA is a mandatory injunction").

[4] Absent express provision to the contrary, litigants must bear their own costs. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 249–250 (1975). The Communications Act of 1934 authorizes the award of attorney's fees in a number of provisions, but not in § 332(c)(7)(B)(v). See, *e. g.*, 47 U. S. C. §§ 206, 325(e)(10), 551(f)(2)(C), 605(e)(3)(B)(iii).

[5] The statute of limitations for a § 1983 claim is generally the applicable state-law period for personal-injury torts. *Wilson* v. *Garcia*, 471 U. S. 261, 275, 276 (1985); see also *Owens* v. *Okure*, 488 U. S. 235, 240–241 (1989). On this basis, the applicable limitations period for respondent's § 1983 action would presumably be one year. See *Silva* v. *Crain*, 169 F. 3d 608, 610 (CA9 1999) (citing Cal. Civ. Proc. Code Ann. § 340(3) (West 1982)). It may be, however, that this limitations period does not apply to respondent's § 1983 claim. In 1990, Congress enacted 28 U. S. C. § 1658(a) (2000 ed., Supp. II), which provides a 4-year, catchall limitations period applicable to "civil action[s] arising under an Act of Congress enacted after" December 1, 1990. In *Jones* v. *R. R. Donnelley & Sons Co.*, 541 U. S. 369 (2004), we held that this 4-year limitations period applies to all claims "made possible by a post-1990 [congressional] enactment." *Id.*, at 382. Since the claim here rests upon violation of the post-1990 TCA, § 1658 would seem to apply.

2002) (Alito, J.) ("TCA plaintiffs are often large corporations or affiliated entities, whereas TCA defendants are often small, rural municipalities"); *Primeco Personal Communications, Ltd. Partnership* v. *Mequon*, 352 F. 3d 1147, 1152 (CA7 2003) (Posner, J.) (similar).

Respondent's only response to the attorney's-fees point is that it is a "policy argumen[t]," properly left to Congress. Brief for Respondent 35–36. That response assumes, however, that Congress's refusal to attach attorney's fees to the remedy that it created in the TCA does not *itself* represent a congressional choice. *Sea Clammers* and *Smith* adopt the opposite assumption—that limitations upon the remedy contained in the statute are deliberate and are not to be evaded through § 1983. See *Smith*, 468 U. S., at 1011–1012, and n. 5; *Sea Clammers*, 453 U. S., at 14, 20.

Respondent disputes that a § 1983 action to enforce § 332(c)(7)(B) would enjoy a longer statute of limitations than an action under § 332(c)(7)(B)(v). He argues that the rule adopted in *Wilson* v. *Garcia*, 471 U. S. 261 (1985), that § 1983 claims are governed by the state-law statute of limitations for personal-injury torts, does not apply to § 1983 actions to enforce statutes that themselves contain a statute of limitations; in such cases, he argues, the limitations period in the federal statute displaces the otherwise applicable state statute of limitations. This contention cannot be reconciled with our decision in *Wilson*, which expressly rejected the proposition that the limitations period for a § 1983 claim depends on the nature of the underlying right being asserted. See *id.*, at 271–275. We concluded instead that 42 U. S. C. § 1988 is "a directive to select, in each State, the one most appropriate statute of limitations for *all* § 1983 claims." 471 U. S., at 275 (emphasis added); see also *Owens* v. *Okure*, 488 U. S. 235, 240–241 (1989) ("42 U. S. C. § 1988 requires courts to borrow and apply to *all § 1983 claims* the one most analogous state statute of limitations" (emphasis added)). We acknowledged that "a few § 1983 claims are based on statutory

rights," *Wilson*, *supra*, at 278, but carved out no exception for them.

Respondent also argues that, if 28 U. S. C. § 1658 (2000 ed., Supp. II), rather than *Wilson*, applies to his § 1983 action, see n. 5, *supra*, § 1658's 4-year statute of limitations is inapplicable. This is so, he claims, because § 332(c)(7)(B)(v)'s requirement that actions be filed within 30 days falls within § 1658's prefatory clause, "Except as otherwise provided by law."[6] We think not. The language of § 332(c)(7)(B)(v) that imposes the limitations period ("within 30 days after such action or failure to act") is inextricably linked to—indeed, is embedded within—the language that creates the right of action ("may . . . commence an action in any court of competent jurisdiction"). It cannot possibly be regarded as a statute of limitations generally applicable to *any* action to enforce the rights created by § 332(c)(7)(B). Cf. *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U. S. 143, 168 (1987) (SCALIA, J., concurring in judgment) ("Federal statutes of limitations . . . are almost invariably tied to specific causes of action"). Respondent's argument thus reduces to a suggestion that we "borrow" § 332(c)(7)(B)(v)'s statute of limitations and attach it to § 1983 actions asserting violations of § 332(c)(7)(B). Section 1658's "[e]xcept as otherwise provided by law" clause does not support this suggestion.

C

The Ninth Circuit based its conclusion that Congress intended to permit plaintiffs to proceed under § 1983, in part, on the TCA's so-called "saving clause," TCA § 601(c)(1), 110 Stat. 143, note following 47 U. S. C. § 152. 354 F. 3d, at 1099–1100. That provision reads as follows:

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[6] Title 28 U. S. C. § 1658(a) provides as follows:

"Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues."

> "(1) NO IMPLIED EFFECT—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments."

The Court of Appeals took this to be an express statement of Congress's intent *not* to preclude an action under § 1983, reasoning that to do so would be to "'impair'" the operation of that section. *Id.*, at 1100.

We do not think this an apt assessment of what "impair-[ment]" consists of. Construing § 332(c)(7), as we do, to create rights that may be enforced only through the statute's express remedy leaves the pre-TCA operation of § 1983 entirely unaffected. Indeed, the crux of our holding is that § 332(c)(7) has no effect on § 1983 whatsoever: The rights § 332(c)(7) created may not be enforced under § 1983 and, conversely, the claims available under § 1983 prior to the enactment of the TCA continue to be available after its enactment. The saving clause of the TCA does not require a court to go further and permit enforcement under § 1983 of the TCA's substantive standards. To apply to the present case what we said with regard to a different statute: "The right [Abrams] claims under [§ 332(c)(7)] did not even arguably exist before the passage of [the TCA]. The only question here, therefore, is whether the rights created by [the TCA] may be asserted within the *remedial* framework of [§ 1983]." *Great American Fed. Sav. & Loan Assn.* v. *Novotny*, 442 U. S. 366, 376–377 (1979).

This interpretation of the saving clause is consistent with *Sea Clammers*. Saving clauses attached to the statutes at issue in that case provided that the statutes should not be interpreted to "'restrict any right which any person . . . may have under any statute or common law to seek enforcement of any . . . standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).' 33 U. S. C. § 1365(e)." 453 U. S., at 7, n. 10; see

also *id.*, at 7–8, n. 11. We refused to read those clauses to "preserve" a § 1983 action, holding that they did not "refer . . . to a suit for redress of a violation of th[e] statutes [at issue] . . . ." *Id.*, at 20–21, n. 31.

* * *

Enforcement of § 332(c)(7) through § 1983 would distort the scheme of expedited judicial review and limited remedies created by § 332(c)(7)(B)(v). We therefore hold that the TCA—by providing a judicial remedy different from § 1983 in § 332(c)(7) itself—precluded resort to § 1983. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE BREYER, with whom JUSTICE O'CONNOR, JUSTICE SOUTER, and JUSTICE GINSBURG join, concurring.

I agree with the Court. It wisely rejects the Government's proposed rule that the availability of a private judicial remedy "*conclusively establishes* . . . a congressional intent to preclude [Rev. Stat. § 1979, 42 U. S. C.] § 1983 relief." *Ante*, at 122 (emphasis added). The statute books are too many, federal laws too diverse, and their purposes too complex for any legal formula to provide more than general guidance. Cf. *Gonzaga Univ.* v. *Doe*, 536 U. S. 273, 291 (2002) (BREYER, J., concurring in judgment). The Court today provides general guidance in the form of an "ordinary inference" that when Congress creates a specific judicial remedy, it does so to the exclusion of § 1983. *Ante*, at 122. I would add that context, not just literal text, will often lead a court to Congress' intent in respect to a particular statute. Cf. *ibid.* (referring to "implicit" textual indications).

Context here, for example, makes clear that Congress saw a national problem, namely, an "inconsistent and, at times,

conflicting patchwork" of state and local siting requirements, which threatened "the deployment" of a national wireless communication system. H. R. Rep. No. 104–204, pt. 1, p. 94 (1995). Congress initially considered a single national solution, namely, a Federal Communications Commission wireless tower siting policy that would pre-empt state and local authority. *Ibid.*; see also H. R. Conf. Rep. No. 104–458, p. 207 (1996). But Congress ultimately rejected the national approach and substituted a system based on cooperative federalism. *Id.*, at 207–208. State and local authorities would remain free to make siting decisions. They would do so, however, subject to minimum federal standards—both substantive and procedural—as well as federal judicial review.

The statute requires local zoning boards, for example, to address permit applications "within a reasonable period of time"; the boards must maintain a "written record" and give reasons for denials "in writing." 47 U. S. C. §§ 332(c)(7)(B)(ii), (iii). Those "adversely affected" by "final action" of a state or local government (including their "failure to act") may obtain judicial review provided they file their review action within 30 days. § 332(c)(7)(B)(v). The reviewing court must "hear and decide such action on an expedited basis." *Ibid.* And the court must determine, among other things, whether a zoning board's decision denying a permit is supported by "substantial evidence." § 332(c)(7)(B)(iii).

This procedural and judicial review scheme resembles that governing many federal agency decisions. See H. R. Conf. Rep. No. 104–458, at 208 ("The phrase 'substantial evidence contained in a written record' is the traditional standard used for judicial review of agency actions"). Section 1983 suits, however, differ considerably from ordinary review of agency action. The former involve plenary judicial evaluation of asserted rights deprivations; the latter involves deferential consideration of matters within an agency's expertise. And, in my view, to permit § 1983 actions here would under-

mine the compromise—between purely federal and purely local siting policies—that the statute reflects.

For these reasons, and for those set forth by the Court, I agree that Congress, in this statute, intended its judicial remedy as an exclusive remedy. In particular, Congress intended that remedy to foreclose—not to supplement—§ 1983 relief.

JUSTICE STEVENS, concurring in the judgment.

When a federal statute creates a new right but fails to specify whether plaintiffs may or may not recover damages or attorney's fees, we must fill the gap in the statute's text by examining all relevant evidence that sheds light on the intent of the enacting Congress. The inquiry varies from statute to statute. Sometimes the question is whether, despite its silence, Congress intended us to recognize an implied cause of action. See, *e. g.*, *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979). Sometimes we ask whether, despite its silence, Congress intended us to enforce the pre-existing remedy provided in Rev. Stat. § 1979, 42 U. S. C. § 1983. See *Maine* v. *Thiboutot*, 448 U. S. 1, 4 (1980). And still other times, despite Congress' inclusion of specific clauses designed specifically to preserve pre-existing remedies, we have nevertheless concluded that Congress impliedly foreclosed the § 1983 remedy. See *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 13 (1981). Whenever we perform this gap-filling task, it is appropriate not only to study the text and structure of the statutory scheme, but also to examine its legislative history. See, *e. g.*, *id.*, at 17–18; *Smith* v. *Robinson*, 468 U. S. 992, 1009 (1984); *Cannon*, 441 U. S., at 694.

In this case the statute's text, structure, and history all provide convincing evidence that Congress intended the Telecommunications Act of 1996 (TCA) to operate as a comprehensive and exclusive remedial scheme. The structure of the statute appears fundamentally incompatible with the

private remedy offered by § 1983.* Moreover, there is not a shred of evidence in the legislative history suggesting that, despite this structure, Congress intended plaintiffs to be able to recover damages and attorney's fees. Thus, petitioners have made "the *difficult showing* that allowing § 1983 actions to go forward in these circumstances 'would be inconsistent with Congress' carefully tailored scheme.'" *Blessing* v. *Freestone*, 520 U. S. 329, 346 (1997) (quoting *Golden State Transit Corp.* v. *Los Angeles*, 493 U. S. 103, 107 (1989); emphasis added). I therefore join the judgment of the Court without reservation.

Two flaws in the Court's approach, however, persuade me to write separately. First, I do not believe that the Court has properly acknowledged the strength of our normal presumption that Congress intended to preserve, rather than preclude, the availability of § 1983 as a remedy for the enforcement of federal statutory rights. Title 42 U. S. C.

*The evidence supporting this conclusion is substantial. It includes, *inter alia*, the fact that the private remedy specified in 47 U. S. C. § 332(c)(7)(B)(v) requires all enforcement actions to be brought in any court of competent jurisdiction "within 30 days after such action or failure to act." Once a plaintiff brings such an action, the statute requires the court both to "hear and decide" the case "on an expedited basis." *Ibid.* As the Court properly notes, *ante*, at 122–123, the TCA's streamlined and expedited scheme for resolving telecommunication zoning disputes is fundamentally incompatible with the applicable limitations periods that generally govern § 1983 litigation, see, *e. g.*, *Wilson* v. *Garcia*, 471 U. S. 261 (1985), as well as the deliberate pace with which civil rights litigation generally proceeds. See, *e. g.*, H. R. Conf. Rep. No. 104–458, pp. 208–209 (1996) (expressing the intent of the congressional Conference that zoning decisions should be "rendered in a reasonable period of time" and that Congress expected courts to "act expeditiously in deciding such cases" that may arise from disputed decisions). Like the Court, I am not persuaded that the statutory requirements can simply be mapped onto the existing structure of § 1983, and there is nothing in the legislative history to suggest that Congress would have wanted us to do so. For these reasons, among others, I believe it is clear that Congress intended § 332(c)(7) to operate as the exclusive remedy by which plaintiffs can obtain judicial relief for violations of the TCA.

§ 1983 was "intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." *Monell* v. *New York City Dept. of Social Servs.*, 436 U. S. 658, 700–701 (1978). "We do not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy . . . . Since 1871, when it was passed by Congress, § 1983 has stood as an independent safeguard against deprivations of federal constitutional and statutory rights." *Smith*, 468 U. S., at 1012. Although the Court is correct to point out that this presumption is rebuttable, it remains true that only an *exceptional* case—such as one involving an unusually comprehensive and exclusive statutory scheme—will lead us to conclude that a given statute impliedly forecloses a § 1983 remedy. See *Wright* v. *Roanoke Redevelopment and Housing Authority*, 479 U. S. 418, 425 (1987) (statutory scheme must be "sufficiently comprehensive and effective to raise a clear inference that Congress intended to foreclose a § 1983 cause of action"). While I find it easy to conclude that petitioners have met that heavy burden here, there will be many instances in which § 1983 will be available even though Congress has not explicitly so provided in the text of the statute in question. See, *e. g.*, *id.*, at 424–425; *Blessing*, 520 U. S., at 346–348.

Second, the Court incorrectly assumes that the legislative history of the statute is totally irrelevant. This is contrary to nearly every case we have decided in this area of law, all of which have surveyed, or at least acknowledged, the available legislative history or lack thereof. See, *e. g.*, *Wright*, 479 U. S., at 424–426 (citing legislative history); *Smith*, 468 U. S., at 1009–1010 (same); *Sea Clammers*, 453 U. S., at 17–18 (noting that one of the relevant factors in the Court's inquiry "include[s] the legislative history"); *Cannon*, 441 U. S., at 694 (same).

Additionally, as a general matter of statutory interpretation, Congress' failure to discuss an issue during prolonged legislative deliberations may itself be probative. As THE

CHIEF JUSTICE has cogently observed: "In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night." *Harrison* v. *PPG Industries, Inc.*, 446 U. S. 578, 602 (1980) (dissenting opinion). The Court has endorsed the view that Congress' silence on questions such as this one "can be likened to the dog that did not bark." *Chisom* v. *Roemer*, 501 U. S. 380, 396, n. 23 (1991) (citing A. Doyle, Silver Blaze, in The Complete Sherlock Holmes 335 (1927)). Congressional silence is surely probative in this case because, despite the fact that awards of damages and attorney's fees could have potentially disastrous consequences for the likely defendants in most private actions under the TCA, see *Primeco Personal Communications* v. *Mequon*, 352 F. 3d 1147, 1152 (CA7 2003), nowhere in the course of Congress' lengthy deliberations is there any hint that Congress wanted damages or attorney's fees to be available. That silence reinforces every other clue that we can glean from the statute's text and structure.

For these reasons, I concur in the Court's judgment.

Syllabus

# BROWN, WARDEN *v.* PAYTON

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03–1039. Argued November 10, 2004—Decided March 22, 2005

In the penalty phase of respondent Payton's trial following his conviction on capital murder and related charges, his counsel presented witnesses who testified that, during the one year and nine months Payton had been incarcerated since his arrest, he had made a sincere commitment to God, participated in prison Bible study and a prison ministry, and had a calming effect on other prisoners. The trial judge gave jury instructions that followed verbatim the text of a California statute, setting forth 11 different factors, labeled (a) through (k), to guide the jury in determining whether to impose a death sentence or life imprisonment. The last such instruction, the so-called factor (k) instruction, directed jurors to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." In his closing, the prosecutor offered jurors his incorrect opinion that factor (k) did not allow them to consider anything that happened after the crime. Although he also told them several times that, in his view, they had not heard any evidence of mitigation, he discussed Payton's evidence in considerable detail and argued that the circumstances and facts of the case, coupled with Payton's prior violent acts, outweighed the mitigating effect of Payton's religious conversion. When the defense objected to the argument, the court admonished the jury that the prosecutor's comments were merely argument, but it did not explicitly instruct that the prosecutor's interpretation was incorrect. Finding the special circumstance of murder in the course of rape, the jury recommended that Payton be sentenced to death, and the judge complied. The California Supreme Court affirmed. Applying *Boyde* v. *California*, 494 U. S. 370, which had considered the constitutionality of the identical factor (k) instruction, the state court held that, considering the context of the proceedings, there was no reasonable likelihood that the jury believed it was required to disregard Payton's mitigating evidence. The Federal District Court disagreed and granted Payton habeas relief, ruling also that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) did not apply. The en banc Ninth Circuit affirmed and, like the District Court, held that AEDPA did not apply. On remand from this Court in light of *Woodford* v. *Garceau*, 538 U. S. 202, the Ninth Circuit purported to decide the case under the deferential standard

AEDPA mandates. It again affirmed, concluding that the California Supreme Court had unreasonably applied *Boyde* in holding the factor (k) instruction was not unconstitutionally ambiguous in Payton's case. The error, the court determined, was that the factor (k) instruction did not make it clear to the jury that it could consider the evidence concerning Payton's postcrime religious conversion and the prosecutor was allowed to urge this erroneous interpretation.

*Held:* The Ninth Circuit's decision was contrary to the limits on federal habeas review imposed by AEDPA. Pp. 141–147.

(a) AEDPA provides that, when a habeas petitioner's claim has been adjudicated on the merits in state court, a federal court may not grant relief unless the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U. S. C. § 2254(d)(1). A state-court decision is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth in this Court's cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result. *E. g.*, *Williams* v. *Taylor*, 529 U. S. 362, 405. A state-court decision involves an unreasonable application of this Court's clearly established precedents if the state court applies such precedents to the facts in an objectively unreasonable manner. *E. g.*, *ibid.* These conditions have not been established. P. 141.

(b) In light of *Boyde*, the California Supreme Court cannot be said to have acted unreasonably in declining to distinguish between precrime and postcrime mitigating evidence. The California Supreme Court read *Boyde* as establishing that factor (k)'s text was broad enough to accommodate Payton's postcrime mitigating evidence, but the Ninth Circuit held that *Boyde*'s reasoning did not control in this case because *Boyde* concerned precrime, not postcrime, mitigation evidence. However, *Boyde* held that factor (k) directed consideration of any circumstance that might excuse the crime, see 494 U. S., at 382, and it is not unreasonable to believe that a postcrime character transformation could do so. Pp. 141–143.

(c) Even were the Court to assume that the California Supreme Court was incorrect in concluding that the prosecutor's argument and remarks did not mislead the jury into believing it could not consider Payton's mitigation evidence, the state court's conclusion was not unreasonable, and is therefore just the type of decision that AEDPA shields on habeas review. The state court's conclusion was an application of *Boyde* to similar but not identical facts. Considering the whole context of the proceedings, it was not unreasonable for the state court to determine

that the jury most likely believed that the mitigation evidence, while within the factor (k) instruction's reach, was simply too insubstantial to overcome the arguments for imposing the death penalty; nor was it unreasonable for the state court to rely upon *Boyde* to support its analysis. Pp. 143–147.

346 F. 3d 1204, reversed.

KENNEDY, J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, THOMAS, and BREYER, JJ., joined. SCALIA, J., filed a concurring opinion, in which THOMAS, J., joined, *post*, p. 147. BREYER, J., filed a concurring opinion, *post*, p. 148. SOUTER, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined, *post*, p. 149. REHNQUIST, C. J., took no part in the decision of the case.

*A. Natalia Cortina*, Deputy Attorney General of California, argued the cause for petitioner. With her on the briefs were *Bill Lockyer*, Attorney General, *Manuel M. Medeiros*, State Solicitor General, *Robert R. Anderson*, Chief Assistant Attorney General, *Gary W. Schons*, Senior Assistant Attorney General, *Steven T. Oetting*, Supervising Deputy Attorney General, and *Melissa A. Mandel*, Deputy Attorney General.

*Dean R. Gits* argued the cause for respondent. With him on the brief were *Maria E. Stratton*, *Mark R. Drozdowski*, and *Rosalie L. Rakoff*.*

JUSTICE KENNEDY delivered the opinion of the Court.

The United States Court of Appeals for the Ninth Circuit, convening en banc, granted habeas relief to respondent William Payton. It held that the jury instructions in the penalty phase of his trial for capital murder did not permit consideration of all the mitigation evidence Payton presented. The error, the court determined, was that the general mitigation instruction did not make it clear to the jury that it could consider evidence concerning Payton's post-crime religious conversion and the prosecutor was allowed

**Kent S. Scheidegger* and *Charles L. Hobson* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging reversal.

to urge this erroneous interpretation. We granted the petition for certiorari, 541 U. S. 1062 (2004), to decide whether the Ninth Circuit's decision was contrary to the limits on federal habeas review imposed by 28 U. S. C. § 2254(d). We now reverse.

## I

In 1980, while spending the night at a boarding house, Payton raped another boarder, Pamela Montgomery, and then used a butcher knife to stab her to death. Payton proceeded to enter the bedroom of the house's patron, Patricia Pensinger, and to stab her as she slept aside her 10-year-old son, Blaine. When Blaine resisted, Payton started to stab him as well. Payton's knife blade bent, and he went to the kitchen to retrieve another. Upon the intervention of other boarders, Payton dropped the second knife and fled.

Payton was arrested and tried for the first-degree murder and rape of Pamela Montgomery and for the attempted murders of Patricia and Blaine Pensinger. Payton presented no evidence in the guilt phase of the trial and was convicted on all counts. The trial proceeded to the penalty phase, where the prosecutor introduced evidence of a prior incident when Payton stabbed a girlfriend; a prior conviction for rape; a prior drug-related felony conviction; and evidence of jailhouse conversations in which Payton admitted he had an "urge to kill" and a "severe problem with sex and women" that caused him to view all women as potential victims to "stab . . . and rape." *People* v. *Payton*, 3 Cal. 4th 1050, 1058, 839 P. 2d 1035, 1040 (1992) (internal quotation marks omitted).

Defense counsel concentrated on Payton's postcrime behavior and presented evidence from eight witnesses. They testified that in the year and nine months Payton spent in prison since his arrest, he had made a sincere commitment to God, participated in prison Bible study classes and a prison ministry, and had a calming effect on other prisoners.

Before the penalty phase closing arguments, the judge held an in-chambers conference with counsel to discuss jury instructions. He proposed to give—and later did give—an instruction which followed verbatim the text of a California statute. Cal. Penal Code Ann. § 190.3 (West 1988). The instruction set forth 11 different factors, labeled (a) through (k), for the jury to "consider, take into account and be guided by" in determining whether to impose a sentence of life imprisonment or death. 1 Cal. Jury Instr., Crim., No. 8.84.1 (4th rev. ed. 1979).

The in-chambers conference considered in particular the last instruction in the series, the so-called factor (k) instruction. Factor (k) was a catchall instruction, in contrast to the greater specificity of the instructions that preceded it. As set forth in the statute, and as explained to the jury, it directed jurors to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Cal. Penal Code Ann. § 190.3 (West 1988). (The statute has since been amended.)

Defense counsel objected to the instruction and asked that it be modified to direct the jury, in more specific terms, to consider evidence of the defendant's character and background. The prosecution, on the other hand, indicated that in its view factor (k) was not intended to encompass evidence concerning a defendant's background or character. The court agreed with defense counsel that factor (k) was a general instruction covering all mitigating evidence. It declined, however, to modify the wording, in part because the instruction repeated the text of the statute. In addition, the court stated: "I assume you gentlemen, as I said, in your argument can certainly relate—relate back to those factors and certainly can argue the defendant's character, background, history, mental condition, physical condition; certainly fall into category 'k' and certainly make a clear argument to the jury." App. 59.

The judge prefaced closing arguments by instructing the jury that what it would hear from counsel was "not evidence but argument" and "[you] should rely on your own recollection of the evidence." *Id.*, at 62. In his closing, the prosecutor offered jurors his opinion that factor (k) did not allow them to consider anything that happened "after the [crime] or later." *Id.*, at 68. The parties do not now dispute that this was a misstatement of law. The defense objected to the comment and moved for a mistrial, which the trial court denied. The court admonished the jury that the prosecutor's comments were merely argument, but it did not explicitly instruct the jury that the prosecutor's interpretation was incorrect. *Id.*, at 69–70.

Although the prosecutor again told the jury several times that, in his view, the jury had not heard any evidence of mitigation, he proceeded to argue that the circumstances and facts of the case, coupled with Payton's prior violent acts, outweighed the mitigating effect of Payton's newfound Christianity. *Id.*, at 70. He discussed the mitigation evidence in considerable detail and concluded by urging that the circumstances of the case and Payton's prior violent acts outweighed his religious conversion. *Id.*, at 75–76. In his closing, defense counsel argued to the jury that, although it might be awkwardly worded, factor (k) was a catchall instruction designed to cover precisely the kind of evidence Payton had presented.

The trial court's final instructions to the jury included the factor (k) instruction, as well as an instruction directing the jury to consider all evidence presented during the trial. *Id.*, at 94. The jury found the special circumstance of murder in the course of committing rape and returned a verdict recommending a death sentence. The judge sentenced Payton to death for murder and to 21 years and 8 months for rape and attempted murder.

On direct appeal to the California Supreme Court, Payton argued that his penalty phase jury incorrectly was led to

believe it could not consider the mitigating evidence of his postconviction conduct in determining whether he should receive a sentence of life imprisonment or death, in violation of the Eighth Amendment of the U. S. Constitution. *Lockett* v. *Ohio*, 438 U. S. 586, 602–609 (1978) (plurality opinion). The text of the factor (k) instruction, he maintained, was misleading, and rendered more so in light of the prosecutor's argument.

In a 5-to-2 decision, the California Supreme Court rejected Payton's claims and affirmed his convictions and sentence. 3 Cal. 4th 1050, 839 P. 2d 1035 (1992). Applying *Boyde* v. *California*, 494 U. S. 370 (1990), which had considered the constitutionality of the same factor (k) instruction, the state court held that in the context of the proceedings there was no reasonable likelihood that Payton's jury believed it was required to disregard his mitigating evidence. 3 Cal. 4th, at 1070–1071, 839 P. 2d, at 1048. Payton sought review of the California Supreme Court's decision here. We declined to grant certiorari. *Payton* v. *California*, 510 U. S. 1040 (1994).

Payton filed a petition for a writ of habeas corpus in the United States District Court for the Central District of California, reiterating that the jury was prevented from considering his mitigation evidence. The District Court held that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, did not apply to Payton's petition because he had filed a motion for appointment of counsel before AEDPA's effective date, even though he did not file the petition until after that date. The District Court considered his claims *de novo* and granted the petition.

On appeal to the Court of Appeals for the Ninth Circuit, a divided panel reversed. *Payton* v. *Woodford*, 258 F. 3d 905 (2001). The Court of Appeals granted Payton's petition for rehearing en banc and, by a 6-to-5 vote, affirmed the District Court's order granting habeas relief. *Payton* v. *Woodford*, 299 F. 3d 815 (2002). The en banc panel, like the District Court, held that AEDPA did not govern Payton's petition.

It, too, conducted a *de novo* review of his claims, and concluded that postcrime mitigation evidence was not encompassed by the factor (k) instruction, a view it found to have been reinforced by the prosecutor's arguments.

The State petitioned for certiorari. Pursuant to *Woodford* v. *Garceau*, 538 U. S. 202 (2003), which held that a request for appointment of counsel did not suffice to make "pending" a habeas petition filed after AEDPA's effective date, we granted the State's petition, *Woodford* v. *Payton*, 538 U. S. 975 (2003), and remanded to the Court of Appeals for reconsideration of its decision under AEDPA's deferential standards. See *Williams* v. *Taylor*, 529 U. S. 362 (2000).

On remand, the en banc panel affirmed the District Court's previous grant of habeas relief by the same 6-to-5 vote. *Payton* v. *Woodford*, 346 F. 3d 1204 (CA9 2003). In light of *Garceau*, the Court of Appeals purported to decide the case under the deferential standard AEDPA mandates. It concluded, however, that the California Supreme Court had unreasonably applied this Court's precedents in holding the factor (k) instruction was not unconstitutionally ambiguous in Payton's case.

The Court of Appeals relied, as it had in its initial decision, on the proposition that *Boyde* concerned precrime, not postcrime, mitigation evidence. *Boyde*, in its view, reasoned that a jury would be unlikely to disregard mitigating evidence as to character because of the long-held social belief that defendants who commit criminal acts attributable to a disadvantaged background may be less culpable than defendants who have no such excuse. As to postcrime mitigating evidence, however, the Court of Appeals concluded that "there is reason to doubt that a jury would similarly consider post-crime evidence of a defendant's religious conversion and good behavior in prison." 346 F. 3d, at 1212. It cited no precedent of this Court to support that supposition.

In addition, it reasoned that unlike in *Boyde* the prosecutor in Payton's case misstated the law and the trial court did

not give a specific instruction rejecting that misstatement, relying instead on a general admonition that counsel's arguments were not evidence. These two differences, the Court of Appeals concluded, made Payton's case unlike *Boyde*. 346 F. 3d, at 1216. In its view, the factor (k) instruction was likely to have misled the jury and it was an unreasonable application of this Court's cases for the California Supreme Court to have concluded otherwise.

II

AEDPA provides that, when a habeas petitioner's claim has been adjudicated on the merits in state-court proceedings, a federal court may not grant relief unless the state court's adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U. S. C. § 2254(d)(1). A state-court decision is contrary to this Court's clearly established precedents if it applies a rule that contradicts the governing law set forth in our cases, or if it confronts a set of facts that is materially indistinguishable from a decision of this Court but reaches a different result. *Williams* v. *Taylor*, *supra*, at 405; *Early* v. *Packer*, 537 U. S. 3, 8 (2002) *(per curiam)*. A state-court decision involves an unreasonable application of this Court's clearly established precedents if the state court applies this Court's precedents to the facts in an objectively unreasonable manner. *Williams* v. *Taylor*, *supra*, at 405; *Woodford* v. *Visciotti*, 537 U. S. 19, 24–25 (2002) *(per curiam)*. These conditions for the grant of federal habeas relief have not been established.

A

The California Supreme Court was correct to identify *Boyde* as the starting point for its analysis. *Boyde* involved a challenge to the same instruction at issue here, factor (k). As to the text of factor (k), *Boyde* established that it does

not limit the jury's consideration of extenuating circumstances solely to circumstances of the crime. See 494 U. S., at 382. In so holding, we expressly rejected the suggestion that factor (k) precluded the jury from considering evidence pertaining to a defendant's background and character because those circumstances did not concern the crime itself. *Boyde* instead found that factor (k), by its terms, directed the jury to consider any other circumstance that might excuse the crime, including factors related to a defendant's background and character. We held:

> "The [factor (k)] instruction did not, as petitioner seems to suggest, limit the jury's consideration to 'any other circumstance *of the crime* which extenuates the gravity of the crime.' The jury was directed to consider *any other circumstance* that might excuse the crime, which certainly includes a defendant's background and character." *Ibid.* (emphasis in original).

The California Supreme Court read *Boyde* as establishing that the text of factor (k) was broad enough to accommodate the postcrime mitigating evidence Payton presented. *People* v. *Payton*, 3 Cal. 4th, at 1070, 839 P. 2d, at 1048. The Court of Appeals held *Boyde*'s reasoning did not control Payton's case because *Boyde* concerned precrime, not postcrime, mitigation evidence. 346 F. 3d, at 1211–1212.

We do not think that, in light of *Boyde*, the California Supreme Court acted unreasonably in declining to distinguish between precrime and postcrime mitigating evidence. After all, *Boyde* held that factor (k) directed consideration of any circumstance that might excuse the crime, and it is not unreasonable to believe that a postcrime character transformation could do so. Indeed, to accept the view that such evidence could not because it occurred after the crime, one would have to reach the surprising conclusion that remorse could never serve to lessen or excuse a crime. But remorse, which by definition can only be experienced after a crime's

commission, is something commonly thought to lessen or excuse a defendant's culpability.

B

That leaves respondent to defend the decision of the Court of Appeals on grounds that, even if it was at least reasonable for the California Supreme Court to conclude that the text of factor (k) allowed the jury to consider the postcrime evidence, it was unreasonable to conclude that the prosecutor's argument and remarks did not mislead the jury into believing it could not consider Payton's mitigation evidence. As we shall explain, however, the California Supreme Court's conclusion that the jury was not reasonably likely to have accepted the prosecutor's narrow view of factor (k) was an application of *Boyde* to similar but not identical facts. Even on the assumption that its conclusion was incorrect, it was not unreasonable, and is therefore just the type of decision that AEDPA shields on habeas review.

The following language from *Boyde* should be noted at the outset:

> "We think the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. . . . Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting." 494 U. S., at 380–381 (footnote omitted).

Unlike in *Boyde* the prosecutor here argued to jurors during his closing that they should not consider Payton's mitigation evidence, evidence which concerned postcrime as op-

posed to precrime conduct. Because *Boyde* sets forth a general framework for determining whether a challenged instruction precluded jurors from considering a defendant's mitigation evidence, however, the California Supreme Court was correct to structure its own analysis on the premises that controlled *Boyde*. The *Boyde* analysis applies here, and, even if it did not dictate a particular outcome in Payton's case, it refutes the conclusion of the Court of Appeals that the California Supreme Court was unreasonable.

The prosecutor's mistaken approach appears most prominently at three different points in the penalty phase. First, in chambers and outside the presence of the jury he argued to the judge that background and character (whether of precrime or postcrime) was simply beyond the ambit of the instruction. Second, he told the jurors in his closing statement that factor (k) did not allow them to consider what happened "after the [crime] or later." App. 68. Third, after defense counsel objected to his narrow view, he argued to the jury that it had not heard any evidence of mitigation. *Id.*, at 70. *Boyde*, however, mandates that the whole context of the trial be considered. And considering the whole context of the trial, it was not unreasonable for the state court to have concluded that this line of prosecutorial argument did not put Payton's mitigating evidence beyond the jury's reach.

The prosecutor's argument came after the defense presented eight witnesses, spanning two days of testimony without a single objection from the prosecution as to its relevance. As the California Supreme Court recognized, like in *Boyde*, for the jury to have believed it could not consider Payton's mitigating evidence, it would have had to believe that the penalty phase served virtually no purpose at all. Payton's counsel recognized as much, arguing to the jury that "[t]he whole purpose for the second phase [of the] trial is to decide the proper punishment to be imposed. Everything that was presented by the defense relates directly to

that." App. 88. He told the jury that if the evidence Payton presented was not entitled to consideration, and therefore "all the evidence we presented [would not be] applicable, why didn't we hear any objections to its relevance?" *Ibid.* The prosecutor was not given an opportunity to rebut defense counsel's argument that factor (k) required the jury to consider Payton's mitigating evidence.

For his part, the prosecutor devoted specific attention to disputing the sincerity of Payton's evidence, stating that "everybody seems to get religion in jail when facing the death penalty" and that "[s]tate prison is full of people who get religion when they are in jail." *Id.*, at 74. Later, he intimated the timing of Payton's religious conversion was suspect, stating "he becomes a newborn Christian, after he's in custody" after "he gets caught." *Ibid.* As the California Supreme Court reasonably surmised, this exercise would have been pointless if the jury believed it could not consider the evidence.

Along similar lines, although the prosecutor characterized Payton's evidence as not being evidence of mitigation, he devoted substantial attention to discounting its importance as compared to the aggravating factors. He said:

> "The law in its simplicity is that the aggravating—if the aggravating factors outweigh the mitigating, the sentence the jury should vote for should be the death penalty. How do the factors line up? The circumstances and facts of the case, the defendant's other acts showing violence . . . , the defendant's two prior convictions line up against really nothing except [the] defendant's newborn Christianity and the fact that he's 28 years old. This is not close. You haven't heard anything to mitigate what he's done. If you wanted to distribute a thousand points over the factors, 900 would have to go to what he did to [the victim], and I really doubt if [defense counsel] would dispute that breakdown of the facts." *Id.*, at 76.

Indeed, the prosecutor characterized testimony concerning Payton's religious conversion as "evidence" on at least four separate occasions. *Id.*, at 68, 70, 73. In context, it was not unreasonable for the state court to conclude that the jury believed Payton's evidence was neither credible nor sufficient to outweigh the aggravating factors, not that it was not evidence at all.

To be sure, the prosecutor advocated a narrow interpretation of factor (k), an interpretation that neither party accepts as correct. There is, however, no indication that the prosecutor's argument was made in bad faith, nor does Payton suggest otherwise. In addition, the first time the jury was exposed to the prosecutor's narrow and incorrect view of factor (k), it had already heard the entirety of Payton's mitigating evidence. Defense counsel immediately objected to the prosecutor's narrow characterization, and the trial court, noting at a side bar that one could "argue it either way," admonished the jury that "the comments by both the prosecution and the defense are not evidence. You've heard the evidence and, as I said, this is argument. And it's to be placed in its proper perspective." *Id.*, at 69–70.

The trial judge, of course, should have advised the jury that it could consider Payton's evidence under factor (k), and allowed counsel simply to argue the evidence's persuasive force instead of the meaning of the instruction itself. The judge is, after all, the one responsible for instructing the jury on the law, a responsibility that may not be abdicated to counsel. Even in the face of the trial court's failure to give an instant curative instruction, however, it was not unreasonable to find that the jurors did not likely believe Payton's mitigation evidence beyond their reach. The jury was not left without any judicial direction. Before it began deliberations as to what penalty was appropriate, the court instructed it to consider all evidence received "during any part of the trial in this case, except as you may be hereafter instructed," *id.*, at 94, and it was not thereafter instructed

to disregard anything. It was also instructed as to factor (k) which, as we held in *Boyde*, by its terms directs jurors to consider any other circumstance that might lessen a defendant's culpability.

Testimony about a religious conversion spanning one year and nine months may well have been considered altogether insignificant in light of the brutality of the crimes, the prior offenses, and a proclivity for committing violent acts against women. It was not unreasonable for the state court to determine that the jury most likely believed that the evidence in mitigation, while within the reach of the factor (k) instruction, was simply too insubstantial to overcome the arguments for imposing the death penalty; nor was it unreasonable for the state court to rely upon *Boyde* to support its analysis. Even were we to assume the "'relevant state-court decision applied clearly established federal law erroneously or incorrectly,'" *Lockyer* v. *Andrade*, 538 U. S. 63, 76 (2003) (quoting *Williams* v. *Taylor*, 529 U. S., at 411), there is no basis for further concluding that the application of our precedents was "objectively unreasonable," *Lockyer*, *supra*, at 76. The Court of Appeals made this last mentioned assumption, and it was in error to do so. The judgment of the Ninth Circuit is reversed.

*It is so ordered.*

THE CHIEF JUSTICE took no part in the decision of this case.

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring.

I join the Court's opinion, which correctly holds that the California Supreme Court's decision was not "contrary to" or "an unreasonable application of" our cases. 28 U. S. C. § 2254(d)(1). Even if our review were not circumscribed by statute, I would adhere to my view that limiting a jury's discretion to consider all mitigating evidence does not violate

the Eighth Amendment. See *Walton* v. *Arizona*, 497 U. S. 639, 673 (1990) (SCALIA, J., concurring in part and concurring in judgment).

JUSTICE BREYER, concurring.

In my view, this is a case in which Congress' instruction to defer to the reasonable conclusions of state-court judges makes a critical difference. See 28 U. S. C. § 2254(d)(1). Were I a California state judge, I would likely hold that Payton's penalty-phase proceedings violated the Eighth Amendment. In a death case, the Constitution requires sentencing juries to consider all mitigating evidence. See, *e. g.*, *Penry* v. *Lynaugh*, 492 U. S. 302, 319 (1989). And here, there might well have been a "reasonable likelihood" that Payton's jury interpreted factor (k), 1 Cal. Jury Instr., Crim., No. 8.84.1(k) (4th rev. ed. 1979), "in a way that prevent[ed]" it from considering "constitutionally relevant" mitigating evidence—namely, evidence of his postcrime religious conversion. *Boyde* v. *California*, 494 U. S. 370, 380 (1990).

Unlike *Boyde*, the prosecutor here told the jury repeatedly—and incorrectly—that factor (k) did not permit it to take account of Payton's postcrime religious conversion. See *post*, at 154–155, 159–160 (SOUTER, J., dissenting). Moreover, the trial judge—also incorrectly—did nothing to correct the record, likely leaving the jury with the impression that it could not do that which the Constitution says it *must*. See *ante*, at 146 (majority opinion); *post*, at 159–160. Finally, factor (k) is ambiguous as to whether it encompassed Payton's mitigation case. Factor (k)'s text focuses on evidence that reduces a defendant's moral culpability for committing the offense. And evidence of postcrime conversion is less obviously related to moral culpability than is evidence of precrime background and character. See *Boyde*, *supra*, at 382, n. 5 (suggesting a distinction between precrime and postcrime evidence). For all these reasons, one could conclude that the jury here might have thought factor (k) barred

its consideration of mitigating evidence, even if the jury in *Boyde* would not there have reached a similar conclusion.

Nonetheless, in circumstances like the present, a federal judge must leave in place a state-court decision unless the federal judge believes that it is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." § 2254(d)(1). For the reasons that the Court discusses, I cannot say that the California Supreme Court decision fails this deferential test. I therefore join the Court's opinion.

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, dissenting.

From a time long before William Payton's trial, it has been clear law under the Eighth and Fourteenth Amendments that a sentencing jury in a capital case must be able to consider and give effect to all relevant mitigating evidence a defendant offers for a sentence less than death. The prosecutor in Payton's case effectively negated this principle in arguing repeatedly to the jury that the law required it to disregard Payton's mitigating evidence of postcrime religious conversion and rehabilitation. The trial judge utterly failed to correct these repeated misstatements or in any other way to honor his duty to give the jury an accurate definition of legitimate mitigation. It was reasonably likely in these circumstances that the jury failed to consider Payton's mitigating evidence, and in concluding otherwise, the Supreme Court of California unreasonably applied settled law, with substantially injurious effect. The Court of Appeals was correct, and I respectfully dissent.

## I

At the time the Supreme Court of California took up Payton's direct appeal of his death sentence for homicide, it was settled law that a capital defendant has a plenary right to present evidence going to any aspect of his character, back-

ground, or record, as well as to any circumstance particular to the offense, that might justify a sentence less than death, *Penry* v. *Lynaugh*, 492 U. S. 302 (1989); *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982); *Lockett* v. *Ohio*, 438 U. S. 586 (1978), including evidence of the defendant's behavior after the offense, *Skipper* v. *South Carolina*, 476 U. S. 1, 4–5 (1986). The law was equally explicit that the sentencer may not refuse to consider any evidence in mitigation, or be precluded from giving it whatever effect it may merit. *Penry* v. *Lynaugh*, *supra*, at 318–320; *Eddings* v. *Oklahoma*, *supra*, at 113–114.

When Payton was tried, California's sentencing law was not well designed to satisfy the State's obligation to provide the sentencer with a way to give effect to all mitigating evidence including developments after commission of the crime. Trial courts were generally bound to charge a sentencing jury to take into account and be guided by a set of legislatively adopted pattern instructions that described relevant subjects of aggravation and mitigation in terms of 11 "factors." These factors ran the gamut from a defendant's age and state of mind at the time of the crime to a qualified catchall at the end: "'(k) [a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.'" *Boyde* v. *California*, 494 U. S. 370, 373–374, and n. 1 (1990); 1 Cal. Jury Instr., Crim., No. 8.84.1 (4th rev. ed. 1979).

This catchall provision, known as factor (k), was the subject of *Boyde*, in which the capital defendant had presented extensive testimony of favorable character in struggling against great childhood disadvantages. 494 U. S., at 381–383. It was understood that the evidence was not open to the jury's consideration under any factor except possibly (k), and the question was whether the instruction to consider "[a]ny other circumstance which extenuates the gravity of the crime" adequately conveyed the idea that character was

such a circumstance, even though it was not a fact limited to the setting of the crime itself.

The Court first laid down the general standard: "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.*, at 380. A "reasonable likelihood" is more than a mere possibility that the jury mistook the law, but a defendant "need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction." *Ibid.* A majority of the Court then concluded on the facts of Boyde's trial that there had been no showing that any ambiguity in the instruction had kept the jury from considering the character evidence. *Id.*, at 383–385.

In support of its application of the general standard in Boyde's case, the Court noted that not all of the other factors in the instruction were tied to the specifics of the crime; the defendant's youth at the time of commission could be considered, for example, along with prior criminal activity and prior felony record. *Id.*, at 383. It was, moreover, only natural for the jury to consider evidence of character in the face of hardships, since society generally holds people less culpable for bad acts related to disadvantages in life. *Id.*, at 382, and n. 5. The Court found it highly implausible that the jury would have thought it had to ignore testimony of such evidence, spanning four days and generating over 400 pages of transcript. *Id.*, at 383–384. The pattern instructions as read by the judge included the admonition to make the penalty decision after considering "'all of the evidence which has been received during any part of the trial,'" *id.*, at 383 (emphasis deleted), and the prosecutor never claimed that the testimony was not relevant, *id.*, at 385. Rather, "the prosecutor explicitly assumed that petitioner's character evidence was a proper factor in the weighing process, but argued that it was minimal in relation to the aggravating circumstances." *Ibid.*

## II

Payton, too, was sentenced to death by a jury that had been given a version of the same pattern instructions, including factor (k). Both the nature of Payton's evidence, however, and the behavior of Payton's prosecutor contrasted sharply with their counterparts in *Boyde*, and in a significant respect the version of the pattern instructions read to Payton's jury differed from the version the *Boyde* jury heard.

Although the penalty phase of Payton's trial stretched over three days, mitigation evidence offered through testimony on Payton's behalf came in during parts of two half days. App. 15–54. In the first such session, two witnesses, one a minister and the other her congregation's missions director, said that since the commission of his crimes Payton had made a "commitment to the Lord" that they believed to be sincere, *id.*, at 18, 23; that he had demonstrated remorse, *id.*, at 18; and that he manifested his new faith in Bible study, writing, and spiritual help to fellow inmates, *id.*, at 22–29. Because Payton's remaining witnesses were not available, the trial judge excused the jury after just "a short day." *Id.*, at 31.

Following a weekend break, six witnesses appeared for Payton, including four former fellow inmates who testified that he frequently led religious discussions among prisoners, that he exerted "a very good influence" on others, *id.*, at 34, and that he "always tr[ied] to help people out," *id.*, at 39. See generally *id.*, at 32–44. A fifth witness, a deputy sheriff at Payton's jail, corroborated this testimony, *id.*, at 45–48, and said that he was glad to have Payton at the jail because he had a calming influence on other inmates, and because he occasionally informed the authorities of developing problems, *id.*, at 49. Finally, Payton's mother testified that she had seen a change in him during incarceration and believed his religious conversion was sincere. *Id.*, at 52–54. Thus, Payton's evidence went entirely to his postcrime conversion and

his potential for rehabilitation and usefulness; the presentation of this evidence produced a transcript of only 50 pages.

The trial court sent the case to the jury the next day, after meeting with the prosecutor and defense counsel to discuss the charge, including the factor (k) instruction to consider any other circumstance extenuating the gravity of the crime. *Boyde* had not been decided at that point, and defense counsel expressed concern that factor (k) could be understood to exclude consideration of Payton's mitigating evidence because the facts shown "have something to do with his potential for rehabilitation or his character or his background, but they don't have anything to do with the crime itself . . . ." App. 55. The prosecutor readily agreed with that reading. He responded that the language of factor (k) was intended to reach only circumstances extenuating the gravity of the crime, to the exclusion of character and background. *Ibid.* Indeed, the prosecutor maintained that he did not see "any ambiguity" in factor (k), *id.*, at 57, and that if the legislature had meant background or character to be considered under factor (k), it would have said so explicitly, *id.*, at 58.

The trial court agreed with defense counsel that background and character (including the claimed conversion) should be subject to consideration under factor (k), but declined to alter the instruction because it was hesitant to depart from the statutory text. *Id.*, at 58, 61. Instead, the judge advised the lawyers that they were free to "argue [that] the defendant's character, background, history, mental condition, physical condition . . . certainly fall into category 'k' and certainly make a clear argument to the jury." *Id.*, at 59. After the judge said explicitly that he thought "'k' is the all encompassing one that includes . . . what you want added," *id.*, at 60, defense counsel lobbied one last time for a more accurate instruction, but was rebuffed:

> "[Defense counsel]: My only problem is I think we all agree that that's the law, but the jury's not going to know.

> "The Court: I agree with you. . . . But I'm going to deny [your request], and for the reasons stated." *Id.*, at 61.

The trial court then brought in the jury for argument and charge. When the prosecutor's closing argument got to the subject of factor (k), this is what he said to the jury:

> "'K' says any other circumstance which extenuates or lessens the gravity of the crime. What does that mean? That to me means some fact—okay?—some factor[s] at the time of the offense that somehow operates to reduce the gravity for what the defendant did. It doesn't refer to anything after the fact or later. That's particularly important here because the only defense evidence you have heard has been about this new born Christianity." *Id.*, at 68.

Payton's lawyer interrupted, both counsel approached the bench, and, out of the jury's hearing, defense counsel moved for mistrial on the ground that the prosecutor's statement was "completely contrary" to the previously agreed interpretation of factor (k). *Ibid.* When the prosecutor replied that defense counsel was wrong and that Payton's mitigating evidence did not fall within factor (k), *id.*, at 69, the trial court failed to resolve the matter, saying that "you can argue it either way," *ibid.* Upon return to open court, the judge instructed the jury that "the comments by both the prosecution and the defense are not evidence. You've heard the evidence and, as I said, this is argument. And it's to be placed in its proper perspective." *Id.*, at 69–70.

The prosecutor then took up exactly where he had left off, arguing that Payton's proffered mitigating evidence could not be considered in the jury's deliberations:

> "Referring back to 'k' which I was talking about, any other circumstance which extenuates or lessens the gravity of the crime, the only defense evidence you've heard had to do with defendant's new Christianity and

that he helped the module deputies in the jail while he was in custody.

"The problem with that is that evidence is well after the fact of the crime and cannot seem to me in any way to logically lessen the gravity of the offense that the defendant has committed.

"[Defense counsel] will tell you that somehow that becoming a newborn Christian, if in fact he really believed that took place, makes it a less severe crime, but there is no way that can happen when—under any other circumstance which extenuates or lessens the gravity of the crime, refers—seems to refer to a fact in operation at the time of the offense.

"What I am getting at, you have not heard during the past few days any legal evidence mitigation. What you've heard is just some jailhouse evidence to win your sympathy, and that's all. You have not heard any evidence of mitigation in this trial." *Id.*, at 70.

After the prosecutor recounted the aggravating circumstances and argued for the death penalty, he turned to the evidence of Payton's religious conversion, questioned its sincerity, and argued that it did not warrant a sentence less than death when weighed against the aggravating factors. Throughout this discussion, he returned to his point that factor (k) authorizes consideration only of facts as of the time of the crime. He reminded the jurors again that they had "heard no evidence of any mitigating factors." *Id.*, at 73. And again: "I don't really want to spend too much time on [religion] because I don't think it's really applicable and I don't think it comes under any of the eleven factors." *Ibid.* And again: "You haven't heard anything to mitigate what he's done." *Id.*, at 76.

With the prosecutor arguing that Payton's mitigation evidence was not open to consideration under (k) or any other factor, and with the trial judge sitting on the fence, defense counsel was left to argue the law himself, stating that "sec-

tion (k) may be awkwardly worded, but it does not preclude or exclude the kind of evidence that was presented. It's a catch-all ph[r]ase. It was designed to include, not exclude, that kind of evidence." *Id.*, at 88. Defense counsel discussed the mitigating evidence at some length before concluding that "I think there are a lot of good reasons to keep Bill Payton alive, an awful lot of good reasons. And that's exactly what I think 'k' is talking about." *Id.*, at 92.

The trial court then gave the jury its final instructions:

> "In determining the penalty to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of the trial in this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, [including] . . . (k), [which says] [a]ny other circumstance which extenuates the gravity of the crime even though not a legal excuse for the crime. . . .
>
> "After having heard all of the evidence and after having heard and considered the argument of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death.
>
> "However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole." *Id.*, at 94–96.

The jury returned a death verdict.

## III

The failure of the State to provide Payton with a process for sentencing that respected his clearly established right to

consideration of all mitigating evidence is plain at every step of the jury's instruction, starting with the trial court's reliance on the pattern jury charge adopted by the legislature.

A

It is undisputed that factor (k) was the instruction that comes closest to addressing the jury's obligation to consider Payton's evidence of postoffense conversion, and the prosecutor's remarks in the chambers colloquy both demonstrate the inadequacy of factor (k) to explain that responsibility and point to the seriousness of the trial court's failure to give a group of laypersons an intelligible statement of the controlling law. Factor (k) calls on the jury to consider evidence going to the "gravity of the crime," a notion commonly understood as the joint product of intent, act, and consequence: intentionally shooting a police officer through the heart is worse than knocking down a pedestrian by careless skateboarding. It is coherent with this understanding to say, as the Court did in *Boyde*, that evaluating a defendant's state of mind at the time of the offense can include consideration of his general character and the experiences that affected its development, 494 U. S., at 381–382; as the Court explained, when society sits in judgment, it does not ignore the early hardships of those who turn out bad, *id.*, at 382. But it would be more than a stretch to say that the seriousness of the crime itself is affected by a defendant's subsequent experience. A criminal's subsequent religious conversion is not a fact commonly accepted as affecting the gravity of the crime, and even jurors who could overcome their skepticism about the sincerity of the conversion claim would see it as addressed not to the nature of the crime but to other issues bearing on sentence: the moral argument for executing a defendant who claims to have realized the awfulness of what he had done, and the practical argument for protecting others in the future by taking a life of one who claims to have been transformed. See, *e. g.*, *Skipper* v. *South Carolina*, 476

U. S., at 4–5. I will assume that a jury instructed by a judge to consider evidence of postoffense experience that extenuates the gravity of the crime could have given effect to the instruction, but without such an explanation it would have been unnatural to think of evidence of later events as affecting the seriousness of an earlier crime.

Indications of the way factor (k) was understood in California at the time of Payton's trial, in fact, point this way. The prosecutor who spoke for the State at the trial repeatedly argued to judge and jury that a "circumstance which extenuates or lessens the gravity of the crime, refers—seems to refer to a fact in operation at the time of the offense." App. 70. The prosecutor held this view in good faith, *ante*, at 146 (majority opinion), and, indeed, his view was shared by the state judiciary; even before *Boyde*, the Supreme Court of California had found factor (k) inadequate to require consideration of all types of mitigating evidence. In 1983, following our discussion in *Eddings*, that court directed that factor (k) be adorned in future cases so as to inform the jury that it may consider "any other 'aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.'" *People* v. *Easley*, 34 Cal. 3d 858, 878, n. 10, 671 P. 2d 813, 826, n. 10 (alterations in original). And, again before *Boyde* came down, the Legislature of California amended factor (k) to instruct the jury to consider "'[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial . . . ].'" 494 U. S., at 374, n. 2 (quoting 1 Cal. Jury Instr., Crim., No. 8.85(k) (5th ed. 1988); alterations in original). Without that amendment, any claim that factor (k) called for consideration of a defendant's personal development in the wake of his crime

was simply at odds with common attitudes and the English language.

B

The next step in the process that failed to give the jury an intelligible instruction to consider all mitigating evidence consisted of the prosecutor's repeated statements telling the jury to ignore Payton's conversion evidence because it was not legally relevant:

> "[Defense counsel] will tell you that somehow that becoming a newborn Christian, if in fact he really believed that took place, makes it a less severe crime, but there is no way that can happen when—under any other circumstance which extenuates or lessens the gravity of the crime, refers—seems to refer to a fact in operation at the time of the offense.
>
> "What I am getting at, you have not heard during the past few days any legal evidence mitigation. What you've heard is just some jailhouse evidence to win your sympathy, and that's all. You have not heard any evidence of mitigation in this trial." App. 70.

Although the prosecutor's argument rested on a perfectly fair reading of the text of the pattern instruction, its effect, in the absence of any further instruction, was to tell the jury that it could not consider the conversion evidence as mitigating. Payton's lawyer immediately objected. He expressed his understanding that the trial judge had agreed that consideration of the mitigating evidence was constitutionally required and meant to let respective counsel argue only about its probative value, even though the judge himself had refused to address this essential constitutional issue specifically in any particular instruction. One would reasonably suppose that the trial judge would have realized that the prosecutor's argument put him on the spot, forcing him to correct the misleading statement of law with an explicit instruction that the jury was free to treat the conversion evi-

dence as mitigating, evaluating its weight as the jury saw fit. It is, after all, elementary law, federal and state, that the judge bears ultimate responsibility for instructing a lay jury in the law. *Carter* v. *Kentucky*, 450 U. S. 288, 302–303 (1981); *Bollenbach* v. *United States*, 326 U. S. 607, 612–614 (1946); *Quercia* v. *United States*, 289 U. S. 466, 469 (1933); *Sparf* v. *United States*, 156 U. S. 51, 102 (1895); *People* v. *Roberge*, 29 Cal. 4th 979, 988, 62 P. 3d 97, 102 (2003); *People* v. *Beardslee*, 53 Cal. 3d 68, 97, 806 P. 2d 1311, 1326 (1991). But the trial judge did no such thing. Instead, he merely told the jury that the prosecutor's argument was not evidence. This instruction cured nothing. The prosecutor's objectionable comment was not a statement about evidence but a statement of law. Telling the jury that a statement of law was not evidence did nothing to correct its functional error in misstating the law.

It is true that the prosecutor argued that Payton's post-crime evidence was not only beyond the jury's consideration legally, but also insufficient to outweigh the aggravating circumstances. The prosecutor, however, minimized the significance even of these brief observations by saying, "I don't really want to spend too much time on it because I don't think it's really applicable and I don't think it comes under any of the eleven factors." App. 73. Far from "explicitly assum[ing]" that the jury's consideration of the evidence was proper, *Boyde*, 494 U. S., at 385, the prosecutor's comments, interwoven with his clear statements on the scope of factor (k), could not have left the listener with any doubt about the prosecutor's view of the legal relevance of the evidence.

Nothing could be further from the circumstances in *Boyde*. There the prosecutor agreed that the character evidence was properly subject to the jury's consideration as mitigating, even under the ambiguous terms of factor (k). *Ibid.* The *Boyde* jury heard argument about the weight of the evidence, but not a word denying its relevance. *Ibid.* Indeed, the *Boyde* majority specifically distinguished the facts before

it from the facts confronting us here, in disclaiming any suggestion "that prosecutorial misrepresentations may never have a decisive effect on the jury," *id.*, at 384; "arguments of counsel, like the instructions of the court, must be judged in the context in which they are made," *id.*, at 385. If the *Boyde* majority thus anticipated a case like this one, with a possibility of substantial prejudice arising from misrepresentation of the law, the Court's prescience is attributable to the State's position in the *Boyde* argument: the Supervising Deputy Attorney General of California appearing for the State in *Boyde* urged the Court to see that case in a light favorable to the State, in contrast to Payton's case, to which counsel referred by name, as a case in which the prosecutor had "misled the jurors." Tr. of Oral Arg. in O. T. 1989, No. 88–6613, p. 29. *Boyde* is thus no authority for giving the State a pass here. The Court is faced with the prosecutor's conceded misstatement, *ante*, at 138 (majority opinion), misleading to the jury, which obliged the trial court, however "reluctant to strike out on its own" beyond the pattern instructions, to "do more than figuratively throw up its hands." *People* v. *Beardslee*, *supra*, at 97, 806 P. 2d, at 1326.

C

The final misstep that distinguishes this case from the authority of *Boyde* is the judge's charge, which must be understood against the background of the mitigating testimonial evidence that the jury did, after all, hear. At each stage of Payton's appeal and collateral challenge, the State has argued that it makes no sense to suggest the jury would have disregarded substantive evidence with no other purpose than mitigation, when ignoring it would have meant that Payton's mitigation witnesses were just putting on a pointless charade. An argument like this was one of the reasons for affirming the conviction in *Boyde*, *supra*, at 383, and both the Supreme Court of California and the majority today rely on a reprise of it to affirm here, *People* v. *Payton*, 3 Cal. 4th

1050, 1072, 839 P. 2d 1035, 1049 (1992); *ante*, at 144 (majority opinion). This is, however, an argument to be entertained only with great caution in the best of circumstances, and while *Boyde*'s circumstances were good, this is a very different case from *Boyde*.

The need for caution is plain: the constitutional concern with mitigating evidence is not satisfied by the mere ability of a defendant to present it. The sentencing body must have a genuine opportunity to consider it and give effect to it. *Penry* v. *Lynaugh*, 492 U. S., at 320. As the Court said in *Boyde*, "[p]resentation of mitigating evidence alone . . . does not guarantee that a jury will feel entitled to consider that evidence." 494 U. S., at 384. For this reason, the Court has found Eighth Amendment violations in circumstances precluding the sentencing body from considering the defendant's mitigating evidence, even where the evidence was extensive and where it accordingly might have been thought unnatural for the sentencer to disregard it. See, *e. g.*, *Penry* v. *Johnson*, 532 U. S. 782, 788, 803–804 (2001); *Eddings* v. *Oklahoma*, 455 U. S., at 107, 113–114.

What is equally plain is that *Boyde* is no authority for thinking the combination of evidence, argument, and charge passes muster here. Boyde's mitigation evidence was extensive enough to take four days and produce over 400 pages of transcript. It addressed character and hardship, subjects recognized by the Court as commonly thought relevant to sentencing, and ignoring it would thus have ignored a large chunk of intuitively acceptable evidence. Payton's evidence, in contrast, required parts of two half days and generated only 50 pages, addressing a claim of dramatic self-reformation that most people would treat with considerable caution. While it would have been unnatural for the jury in *Boyde* to feel barred from considering the character evidence when no lawyer or judge had ever called it irrelevant, Payton's jury had plenty of reason to feel itself precluded: the prosecutor emphatically and repeatedly said that the evi-

dence did not count as the kind of evidence that could extenuate the crime, and the trial judge allowed the prosecutor's statements to go uncorrected.

More significant even than those contrasts between *Boyde* and the facts here is the difference between the two sets of instructions from the trial judges. In *Boyde*, this Court found it significant that "[t]he jury was instructed that it '*shall consider all the evidence* which has been received during any part of the trial of this case.'" 494 U. S., at 383 (emphasis added by *Boyde* majority). Reasonable jurors could therefore hardly "have felt constrained by the factor (k) instruction to *ignore all* of the evidence presented by [the] petitioner during the sentencing phase." *Id.*, at 383–384 (emphasis again supplied by *Boyde* majority).

Here, however, the instruction was different, a variant permitted by the legislature's pattern charge. Here the instruction was not simply to consider all the evidence, but rather, "you shall consider all of the evidence which has been received during any part of the trial in this case, except as you may be hereafter instructed." App. 94. "Hereafter," of course, came the instruction to determine the penalty by applying the 11 enumerated factors, including factor (k). As to the factor (k) focus on the "gravity of the crime," the prosecutor repeatedly had said that evidence of postcrime conversion was irrelevant, and his mistaken and misleading statements of law had never been corrected by the trial judge.

The upshot was this. The jury was told by the judge that some evidence could be excluded from its consideration. The judge presumably had some reason to say this. The only evidence that could reasonably have fallen within the exception was the evidence the prosecutor had just said was legally irrelevant, in a statement that was eminently plausible owing to the language of factor (k) and the subject matter of the evidence. The jurors could naturally have made sense of all they had heard by concluding they were required not

to scrutinize and discount the conversion evidence if they found it unpersuasive, but to skip the scrutiny altogether and ignore the evidence as legally beside the point. This case is nothing like *Boyde*.

But even if the case were closer to *Boyde* than it is, and even if the course of Payton's penalty trial were best viewed the way the majority suggests, that would not satisfy *Boyde*'s test. *Boyde* asks only whether there is a "reasonable likelihood" that the jury understood an instruction as foreclosing consideration of the defendant's mitigating evidence. 494 U. S., at 380. A defendant has no need to show it is "more likely than not" that the jury misunderstood. *Ibid.* Accordingly, even if the best explanation for the jury's verdict were the one the majority offers, that would not resolve Payton's claim. Identifying the "most likely" interpretation of events at Payton's trial, *ante*, at 147 (majority opinion), falls short of negating the reasonably likely alternative that the jury believed it could not consider the story of Payton's postcrime conversion.

The Court's oft-repeated conclusion that the state court did not unreasonably apply *Boyde* seems to rest on two assumptions. The first is a loose understanding of *Boyde* as holding that factor (k) "directs jurors to consider any other circumstance that might lessen a defendant's culpability," *ante*, at 147 (majority opinion). The second is that factor (k) as so understood directs jurors to consider circumstances that do not excuse a crime or lessen a defendant's culpability but nevertheless supply some different (even postcrime) reason to forgo a sentence of death. But *Boyde* held only that the factor (k) instruction tells jurors "to consider any other circumstance that might excuse the crime, which certainly includes a defendant's background and character," 494 U. S., at 382 (emphasis deleted). *Boyde* did not purport to hold that factor (k) naturally called for consideration of postcrime changes of fundamental views. It is thus only by broadening *Boyde* to sanction a misreading of factor (k), a misreading

that the prosecutor himself rejected in good faith, that the Court can find a reasonable application of law in the state court's decision. The mistake will unfortunately reverberate even beyond this case, for the majority further obscures the necessarily inexact distinction between cases that are merely wrong and cases with objectively unreasonable error. Cf. *Penry* v. *Johnson*, 532 U. S. 782 (finding that a confusing jury instruction created a reasonable likelihood the jury would not feel free to consider mitigating evidence, and that the state court's contrary conclusion was "objectively unreasonable," even though the jury heard extensive mitigating evidence submitted without objection as to relevance, even though the judge took care to instruct the jury to consider "'any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate,'" *id.*, at 790, even though the prosecutor never questioned the relevance of the evidence when addressing the jury, and even though both counsel argued at length to the jury about the weight of the evidence).

## IV

By the State's admission in this case, the prosecutor's argument was a "misstatement" of constitutional law. By the State's admission in *Boyde*, the prosecutor here "misled" the jury. Despite objection by defense counsel, the trial judge refused to correct the misstatement, which the prosecutor proceeded to repeat. The judge's subsequent charge to consider all evidence was subject to a qualification that the jury could reasonably have understood only as referring to the mitigation evidence the prosecutor had branded as irrelevant under a straightforward reading of the pattern instructions.

If a prosecutor had stood before a jury and denied that a defendant was entitled to a presumption of innocence; if the judge refused to correct him and failed to give any instruction on the presumption of innocence; if the judge's instructions affirmatively suggested there might not be a presump-

tion of innocence; would anyone doubt that there was a reasonable possibility that the jury had been misled? There is no more room here to doubt the reasonable possibility that Payton's jurors failed to consider the postoffense mitigation evidence that the Constitution required them to consider. In a case that contrasts with *Boyde* at every significant step, the State Supreme Court's affirmance of Payton's conviction can only be seen as an unreasonable misapplication of the governing federal standard, not mere error. And since Payton's death sentence is subject to this reasonable possibility of constitutional error, since he may die as a consequence, the effect of the instruction failure is surely substantial and injurious, *Brecht* v. *Abrahamson*, 507 U. S. 619, 638 (1993), beyond any possible excuse as harmless error.

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# JACKSON *v.* BIRMINGHAM BOARD OF EDUCATION

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02–1672. Argued November 30, 2004—Decided March 29, 2005

After petitioner, the girls' basketball coach at a public high school, discovered that his team was not receiving equal funding and equal access to athletic equipment and facilities, he complained unsuccessfully to his supervisors. He then received negative work evaluations and ultimately was removed as the girls' coach. He brought this suit alleging that respondent school board (Board) had retaliated against him because he had complained about sex discrimination in the high school's athletic program, and that such retaliation violated Title IX of the Education Amendments of 1972, 20 U. S. C. § 1681(a), which provides that "[n]o person . . . shall, on the basis of sex, be . . . subjected to discrimination under any education program . . . receiving Federal financial assistance." The District Court dismissed the complaint on the ground that Title IX's private cause of action does not include claims of retaliation, and the Eleventh Circuit agreed and affirmed. The appeals court also concluded that, under *Alexander* v. *Sandoval*, 532 U. S. 275, the Department of Education's Title IX regulation expressly prohibiting retaliation does not create a private cause of action, and that, even if Title IX prohibits retaliation, petitioner is not within the class of persons the statute protects.

*Held:* Title IX's private right of action encompasses claims of retaliation against an individual because he has complained about sex discrimination. Pp. 173–184.

(a) When a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional "discrimination" "on the basis of sex," in violation of Title IX. This Court has held that Title IX implies a private right of action to enforce its prohibition on intentional sex discrimination, *Cannon* v. *University of Chicago*, 441 U. S. 677, 690–693, and that that right includes actions for monetary damages by private persons, *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60, and encompasses intentional sex discrimination in the form of a recipient's deliberate indifference to sexual harassment of a student by a teacher, *Gebser* v. *Lago Vista Independent School Dist.*, 524 U. S. 274, 290–291, or by another student, *Davis* v. *Monroe County Bd. of Ed.*, 526 U. S. 629, 642. In all of these cases, the Court relied on

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Title IX's broad language prohibiting a funding recipient from intentionally subjecting any person to "discrimination" "on the basis of sex." Retaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is subjected to differential treatment. Moreover, it is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. The Eleventh Circuit's conclusion that Title IX does not prohibit retaliation because it is silent on the subject ignores the import of this Court's repeated holdings construing "discrimination" under Title IX broadly to include conduct, such as sexual harassment, which the statute does not expressly mention. The fact that Title VII of the Civil Rights Act of 1964 expressly prohibits retaliation is of limited use with respect to Title IX. Title VII is a vastly different statute, which details the conduct that constitutes prohibited discrimination. Because Congress did not list *any* specific discriminatory practices in Title IX, its failure to mention one such practice says nothing about whether it intended that practice to be covered. Moreover, Congress' enactment of Title IX just three years after *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229—in which this Court interpreted 42 U. S. C. § 1982's general prohibition of racial discrimination to include retaliation against a white man for advocating the rights of blacks—provides a realistic basis for presuming that Congress expected Title IX to be interpreted in conformity with *Sullivan*. Pp. 173–177.

(b) The Board cannot rely on this Court's holding in *Sandoval*, *supra*, at 285, that, because Title VI of the Civil Rights Act of 1964 itself prohibits only intentional discrimination, private parties could not obtain redress for disparate-impact discrimination based on the Justice Department's Title VI regulations prohibiting federal funding recipients from adopting policies with such an impact. Citing the Education Department's Title IX retaliation regulation, the Board contends that Jackson, like the *Sandoval* petitioners, seeks an impermissible extension of the statute when he argues that Title IX's private right of action encompasses retaliation. This argument, however, entirely misses the point. The Court does not here rely on the Education Department regulation at all, because Title IX's text *itself* contains the necessary prohibition: Retaliation against a person who speaks out against sex discrimination is intentional "discrimination" "on the basis of sex" within the statute's meaning. Pp. 177–178.

(c) Nor is the Court convinced by the Board's argument that, even if Title IX's private right of action encompasses discrimination, Jackson is not entitled to invoke it because he is an "indirect victi[m]" of sex discrimination. The statute is broadly worded; it does not require that the victim of the retaliation also be the victim of the discrimination that

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is the subject of the original complaint. Where the retaliation occurs because the complainant speaks out about sex discrimination, the statute's "on the basis of sex" requirement is satisfied. The complainant is himself a victim of discriminatory retaliation, regardless of whether he was the subject of the original complaint. Cf. *Sullivan*, *supra*, at 237. Congress enacted Title IX not only to prevent the use of federal dollars to support discriminatory practices, but also "to provide individual citizens effective protection against those practices." *Cannon*, *supra*, at 704. This objective would be difficult to achieve if persons complaining about sex discrimination did not have effective protection against retaliation. Pp. 179–181.

(d) Nor can the Board rely on the principle that, because Title IX was enacted as an exercise of Congress' Spending Clause powers, a private damages action is available only if the federal funding recipient had adequate notice that it could be held liable for the conduct at issue, see, *e. g.*, *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17. *Pennhurst* does not preclude such an action where, as here, the funding recipient engages in intentional acts that clearly violate Title IX. See, *e. g.*, *Davis*, *supra*, at 642. Moreover, the Board should have been put on notice that it could be held liable for retaliation by the fact that this Court's cases since *Cannon* have consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination; by Title IX itself, which expressly prohibits intentional conduct that violates clear statutory terms, *Davis*, 526 U. S., at 642; by the regulations implementing Title IX, which clearly prohibit retaliation and have been on the books for nearly 30 years; and by the holdings of all of the Courts of Appeals that had considered the question at the time of the conduct at issue that Title IX covers retaliation. The Board could not have realistically supposed that, given this context, it remained free to retaliate against those who reported sex discrimination. Cf. *id.*, at 644. Pp. 181–184.

(e) To prevail on the merits, Jackson will have to prove that the Board retaliated against him *because* he complained of sex discrimination. At the present stage, the issue is not whether he will ultimately prevail, but whether he is entitled to offer evidence to support his claims. P. 184.

309 F. 3d 1333, reversed and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and KENNEDY, JJ., joined, *post*, p. 184.

Counsel

*Walter Dellinger* argued the cause for petitioner. With him on the briefs were *Marcia D. Greenberger*, *Jocelyn Samuels*, *Dina R. Lassow*, *Matthew D. Roberts*, and *Pamela A. Harris*.

*Irving L. Gornstein* argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Clement*, *Assistant Attorney General Acosta*, *Dennis J. Dimsey*, and *Linda F. Thome*.

*Kenneth L. Thomas* argued the cause for respondent. With him on the brief was *Valerie L. Acoff*.

*Kevin C. Newsom*, Solicitor General of Alabama, argued the cause for the State of Alabama et al. as *amici curiae* urging affirmance. With him on the brief were *Troy King*, Attorney General, and the Attorneys General for their respective States as follows: *M. Jane Brady* of Delaware, *Mark J. Bennett* of Hawaii, *Brian Sandoval* of Nevada, *Hardy Myers* of Oregon, *Lawrence E. Long* of South Dakota, *Paul G. Summers* of Tennessee, *Mark L. Shurtleff* of Utah, and *Jerry W. Kilgore* of Virginia.*

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*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Robert J. Grey, Jr.*, *Nancy L. Perkins*, and *Kristen Galles*; for the Leadership Conference on Civil Rights by *Virginia A. Seitz*, *Steven Shapiro*, and *Lenora M. Lapidus*; for the National Education Association et al. by *Jeremiah A. Collins*, *Alice O'Brien*, *David M. Rabban*, *Donna R. Euben*, and *Ann D. Springer*; for the National Partnership for Women & Families et al. by *Caroline M. Brown*; for New York Lawyers for the Public Interest et al. by *Jeffrey A. Lamken*, *Macey Reasoner Stokes*, *J. Richard Cohen*, and *Rhonda Brownstein*; and for Birch Bayh by *John F. Cooney*, *Margaret N. Strand*, and *Kevin O. Faley*.

Briefs of *amici curiae* urging affirmance were filed for the Eagle Forum Education & Legal Defense Fund by *Andrew L. Schlafly*; for the National School Boards Association et al. by *Julie Underwood* and *Naomi Gittins*; for the National Wrestling Coaches Association by *Lawrence J. Joseph*; and for the Pacific Legal Foundation by *John H. Findley*.

Briefs of *amici curiae* were filed for the College Sports Council by *Mr. Joseph*; and for the Women's Sports Foundation et al. by *Nancy Hogshead-Makar* and *Howard R. Rubin*.

JUSTICE O'CONNOR delivered the opinion of the Court.

Roderick Jackson, a teacher in the Birmingham, Alabama, public schools, brought suit against the Birmingham Board of Education (Board) alleging that the Board retaliated against him because he had complained about sex discrimination in the high school's athletic program. Jackson claimed that the Board's retaliation violated Title IX of the Education Amendments of 1972, Pub. L. 92–318, 86 Stat. 373, as amended, 20 U. S. C. § 1681 *et seq.* The District Court dismissed Jackson's complaint on the ground that Title IX does not prohibit retaliation, and the Court of Appeals for the Eleventh Circuit affirmed. 309 F. 3d 1333 (2002). We consider here whether the private right of action implied by Title IX encompasses claims of retaliation. We hold that it does where the funding recipient retaliates against an individual because he has complained about sex discrimination.

I

Because Jackson's Title IX claim was dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted, "we must assume the truth of the material facts as alleged in the complaint." *Summit Health, Ltd.* v. *Pinhas*, 500 U. S. 322, 325 (1991).

According to the complaint, Jackson has been an employee of the Birmingham school district for over 10 years. In 1993, the Board hired Jackson to serve as a physical education teacher and girls' basketball coach. Jackson was transferred to Ensley High School in August 1999. At Ensley, he discovered that the girls' team was not receiving equal funding and equal access to athletic equipment and facilities. The lack of adequate funding, equipment, and facilities made it difficult for Jackson to do his job as the team's coach.

In December 2000, Jackson began complaining to his supervisors about the unequal treatment of the girls' basketball team, but to no avail. Jackson's complaints went unanswered, and the school failed to remedy the situation. In-

stead, Jackson began to receive negative work evaluations and ultimately was removed as the girls' coach in May 2001. Jackson is still employed by the Board as a teacher, but he no longer receives supplemental pay for coaching.

After the Board terminated Jackson's coaching duties, he filed suit in the United States District Court for the Northern District of Alabama. He alleged, among other things, that the Board violated Title IX by retaliating against him for protesting the discrimination against the girls' basketball team. Amended Complaint 2–3, App. 10–11. The Board moved to dismiss on the ground that Title IX's private cause of action does not include claims of retaliation. The District Court granted the motion to dismiss.

The Court of Appeals for the Eleventh Circuit affirmed. 309 F. 3d 1333 (2002). It assumed, for purposes of the appeal, that the Board retaliated against Jackson for complaining about Title IX violations. It then held that Jackson's suit failed to state a claim because Title IX does not provide a private right of action for retaliation, reasoning that "[n]othing in the text indicates any congressional concern with retaliation that might be visited on those who complain of Title IX violations." *Id.*, at 1344. Relying on our decision in *Alexander* v. *Sandoval*, 532 U. S. 275 (2001), the Court of Appeals also concluded that a Department of Education regulation expressly prohibiting retaliation does not create a private cause of action for retaliation: "Because Congress has not created a right through Title IX to redress harms resulting from retaliation, [the regulation] may not be read to create one either." 309 F. 3d, at 1346. Finally, the court held that, even if Title IX prohibits retaliation, Jackson would not be entitled to relief because he is not within the class of persons protected by the statute.

We granted certiorari, 542 U. S. 903 (2004), to resolve a conflict in the Circuits over whether Title IX's private right of action encompasses claims of retaliation for complaints about sex discrimination. Compare *Lowrey* v. *Texas A & M*

*Univ. System*, 117 F. 3d 242, 252 (CA5 1997) ("[T]itle IX affords an implied cause of action for retaliation"); *Preston* v. *Virginia ex rel. New River Community College*, 31 F. 3d 203, 206 (CA4 1994) (same), with the case below, *supra*.

## II

### A

Title IX prohibits sex discrimination by recipients of federal education funding. The statute provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U. S. C. § 1681(a). More than 25 years ago, in *Cannon* v. *University of Chicago*, 441 U. S. 677, 690–693 (1979), we held that Title IX implies a private right of action to enforce its prohibition on intentional sex discrimination. In subsequent cases, we have defined the contours of that right of action. In *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60 (1992), we held that it authorizes private parties to seek monetary damages for intentional violations of Title IX. We have also held that the private right of action encompasses intentional sex discrimination in the form of a recipient's deliberate indifference to a teacher's sexual harassment of a student, *Gebser* v. *Lago Vista Independent School Dist.*, 524 U. S. 274, 290–291 (1998), or to sexual harassment of a student by another student, *Davis* v. *Monroe County Bd. of Ed.*, 526 U. S. 629, 642 (1999).

In all of these cases, we relied on the text of Title IX, which, subject to a list of narrow exceptions not at issue here, broadly prohibits a funding recipient from subjecting any person to "discrimination" "on the basis of sex." 20 U. S. C. § 1681. Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action. Retaliation is, by definition, an in-

tentional act. It is a form of "discrimination" because the complainant is being subjected to differential treatment. See generally *Olmstead* v. *L. C.*, 527 U. S. 581, 614 (1999) (KENNEDY, J., concurring in judgment) (the "normal definition of discrimination" is "differential treatment"); see also *Newport News Shipbuilding & Dry Dock Co.* v. *EEOC*, 462 U. S. 669, 682, n. 22 (1983) (discrimination means "less favorable" treatment). Moreover, retaliation is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. We conclude that when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional "discrimination" "on the basis of sex," in violation of Title IX.

The Court of Appeals' conclusion that Title IX does not prohibit retaliation because the "statute makes no mention of retaliation," 309 F. 3d, at 1344, ignores the import of our repeated holdings construing "discrimination" under Title IX broadly. Though the statute does not mention sexual harassment, we have held that sexual harassment is intentional discrimination encompassed by Title IX's private right of action. *Franklin*, 503 U. S., at 74–75; see also *id.*, at 75 (noting that, under *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, 64 (1986), "'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex,'" and holding that "the same rule should apply when a teacher sexually harasses . . . a student"). Thus, a recipient's deliberate indifference to a teacher's sexual harassment of a student also "violate[s] Title IX's plain terms." *Davis*, *supra*, at 643 (citing *Gebser*, *supra*, at 290–291). Likewise, a recipient's deliberate indifference to sexual harassment of a student by another student also squarely constitutes "discrimination" "on the basis of sex." *Davis*, 526 U. S., at 643; see also *id.*, at 650 ("Having previously determined that 'sexual harassment' is 'discrimination' . . . under Title IX, we are constrained to conclude

that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute"). "Discrimination" is a term that covers a wide range of intentional unequal treatment; by using such a broad term, Congress gave the statute a broad reach. See *North Haven Bd. of Ed.* v. *Bell*, 456 U. S. 512, 521 (1982) (Courts "'must accord'" Title IX "'a sweep as broad as its language'").

Congress certainly could have mentioned retaliation in Title IX expressly, as it did in § 704 of Title VII of the Civil Rights Act of 1964, 78 Stat. 257, as amended, 86 Stat. 109, 42 U. S. C. § 2000e–3(a) (providing that it is an "unlawful employment practice" for an employer to retaliate against an employee because he has "opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII]"). Title VII, however, is a vastly different statute from Title IX, see *Gebser*, 524 U. S., at 283–284, 286–287, and the comparison the Board urges us to draw is therefore of limited use. Title IX's cause of action is implied, while Title VII's is express. See *id.*, at 283–284. Title IX is a broadly written general prohibition on discrimination, followed by specific, narrow exceptions to that broad prohibition. See 20 U. S. C. § 1681. By contrast, Title VII spells out in greater detail the conduct that constitutes discrimination in violation of that statute. See 42 U. S. C. §§ 2000e–2 (giving examples of unlawful employment practices), 2000e–3 (prohibiting "[o]ther unlawful employment practices," including (a) "[d]iscrimination" in the form of retaliation; and (b) the discriminatory practice of "[p]rinting or publication of notices or advertisements indicating prohibited preference . . . "). Because Congress did not list *any* specific discriminatory practices when it wrote Title IX, its failure to mention one such practice does not tell us anything about whether it intended that practice to be covered.

Title IX was enacted in 1972, three years after our decision in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229 (1969). In *Sullivan*, we held that Rev. Stat. § 1978, 42 U. S. C. § 1982, which provides that "[a]ll citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property," protected a white man who spoke out against discrimination toward one of his tenants and who suffered retaliation as a result. Sullivan had rented a house to a black man and assigned him a membership share and use rights in a private park. The corporation that owned the park would not approve the assignment to the black lessee. Sullivan protested, and the corporation retaliated against him by expelling him and taking his shares. Sullivan sued the corporation, and we upheld Sullivan's cause of action under 42 U. S. C. § 1982 for "[retaliation] for the advocacy of [the black person's] cause." 396 U. S., at 237. Thus, in *Sullivan* we interpreted a general prohibition on racial discrimination to cover retaliation against those who advocate the rights of groups protected by that prohibition.[1]

Congress enacted Title IX just three years after *Sullivan* was decided, and accordingly that decision provides a valuable context for understanding the statute. As we recognized in *Cannon*, "it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with *[Sullivan]* and that it expected its enactment [of Title IX] to be interpreted in conformity with [it]." 441 U. S., at 699; see also *id.*, at 698, n. 22. Retaliation for Jackson's advocacy of the rights of the girls' basketball team in this case is "dis-

[1] JUSTICE THOMAS contends that *Sullivan* merely decided that the white owner had standing to assert the rights of the black lessee. *Post*, at 194 (dissenting opinion). But *Sullivan*'s holding was not so limited. It plainly held that the white owner could maintain his *own* private cause of action under § 1982 if he could show that he was "punished for trying to vindicate the rights of minorities." 396 U. S., at 237.

crimination" "on the basis of sex," just as retaliation for advocacy on behalf of a black lessee in *Sullivan* was discrimination on the basis of race.

B

The Board contends that our decision in *Alexander* v. *Sandoval*, 532 U. S. 275 (2001), compels a holding that Title IX's private right of action does not encompass retaliation. *Sandoval* involved an interpretation of Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U. S. C. § 2000d *et seq.*, which provides in § 601 that no person shall, "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" covered by Title VI. 42 U. S. C. § 2000d. Section 602 of Title VI authorizes federal agencies to effectuate the provisions in § 601 by enacting regulations. Pursuant to that authority, the Department of Justice promulgated regulations prohibiting funding recipients from adopting policies that had "the effect of subjecting individuals to discrimination because of their race, color, or national origin." 28 CFR § 42.104(b)(2) (1999). The *Sandoval* petitioners brought suit to enjoin an English-only policy of the Alabama Department of Public Safety on grounds that it disparately impacted non-English speakers in violation of the regulations. Though we assumed that the regulations themselves were valid, see 532 U. S., at 281, we rejected the contention that the private right of action to enforce intentional violations of Title VI encompassed suits to enforce the disparate-impact regulations. We did so because "[i]t is clear . . . that the disparate-impact regulations do not simply apply § 601—since they indeed forbid conduct that § 601 permits—and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations." *Id.*, at 285. See also *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 173

(1994) (A "private plaintiff may not bring a [suit based on a regulation] against a defendant for acts not prohibited by the text of [the statute]"). Thus, *Sandoval* held that private parties may not invoke Title VI regulations to obtain redress for disparate-impact discrimination because Title VI itself prohibits only intentional discrimination.

The Board cites a Department of Education regulation prohibiting retaliation "against any individual for the purpose of interfering with any right or privilege secured by [Title IX]," 34 CFR § 100.7(e) (2004) (incorporated by reference by § 106.71), and contends that Jackson, like the petitioners in *Sandoval*, seeks an "impermissible extension of the statute" when he argues that Title IX's private right of action encompasses retaliation. Brief for Respondent 45. This argument, however, entirely misses the point. We do not rely on regulations extending Title IX's protection beyond its statutory limits; indeed, we do not rely on the Department of Education's regulation at all, because the statute *itself* contains the necessary prohibition. As we explain above, see *supra*, at 174–175, the text of Title IX prohibits a funding recipient from retaliating against a person who speaks out against sex discrimination, because such retaliation is intentional "discrimination" "on the basis of sex." We reach this result based on the statute's text. In step with *Sandoval*, we hold that Title IX's private right of action encompasses suits for retaliation, because retaliation falls within the statute's prohibition of intentional discrimination on the basis of sex.[2]

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[2] We agree with JUSTICE THOMAS that plaintiffs may not assert claims under Title IX for conduct not prohibited by that statute. *Post*, at 193 (dissenting opinion). See also *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 173 (1994) ("[T]he private plaintiff may not bring a 10b–5 suit against a defendant for acts not prohibited by the text of § 10(b)"). But we part ways with regard to our reading of the statute. We interpret Title IX's text to clearly prohibit retaliation for complaints about sex discrimination.

C

Nor are we convinced by the Board's argument that, even if Title IX's private right of action encompasses discrimination, Jackson is not entitled to invoke it because he is an "indirect victi[m]" of sex discrimination. Brief for Respondent 33. The statute is broadly worded; it does not require that the victim of the retaliation must also be the victim of the discrimination that is the subject of the original complaint. If the statute provided instead that "no person shall be subjected to discrimination on the basis of *such individual's* sex," then we would agree with the Board. Cf. 42 U. S. C. § 2000e–2(a)(1) ("It shall be an unlawful employment practice for an employer . . . to discriminate against any individual . . . because of *such individual's* race, color, religion, sex, or national origin" (emphasis added)). However, Title IX contains no such limitation. Where the retaliation occurs because the complainant speaks out about sex discrimination, the "on the basis of sex" requirement is satisfied. The complainant is himself a victim of discriminatory retaliation, regardless of whether he was the subject of the original complaint.[3] As we explain above, see *supra*, at 176–177, this is consistent with *Sullivan*, which formed an important part

[3] JUSTICE THOMAS contends that "extending the implied cause of action under Title IX to claims of retaliation expands the class of people the statute protects beyond the specified beneficiaries." *Post*, at 194 (dissenting opinion). But Title IX's beneficiaries plainly include all those who are subjected to "discrimination" "on the basis of sex." 20 U. S. C. § 1681(a). Because, as we explain above, see *supra*, at 174–175, retaliation in response to a complaint about sex discrimination is "discrimination" "on the basis of sex," the statute clearly protects those who suffer such retaliation. The following hypothetical, offered by petitioner at oral argument, illustrates this point: If the male captain of the boys' basketball team and the female captain of the girls' basketball team together approach the school principal to complain about discrimination against the girls' team, and the principal retaliates by expelling them both from the honor society, then both the female and the male captains have been "discriminated" against "on the basis of sex." Tr. of Oral Arg. 53–54.

of the backdrop against which Congress enacted Title IX. *Sullivan* made clear that retaliation claims extend to those who oppose discrimination against others. See 396 U. S., at 237 (holding that a person may bring suit under 42 U. S. C. § 1982 if he can show that he was "punished for trying to vindicate the rights of minorities").

Congress enacted Title IX not only to prevent the use of federal dollars to support discriminatory practices, but also "to provide individual citizens effective protection against those practices." *Cannon*, 441 U. S., at 704. We agree with the United States that this objective "would be difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation." Brief for United States as *Amicus Curiae* 13. If recipients were permitted to retaliate freely, individuals who witness discrimination would be loath to report it, and all manner of Title IX violations might go unremedied as a result. See *Sullivan*, *supra*, at 237 (noting that without protection against retaliation, the underlying discrimination is perpetuated).

Reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel. Recall that Congress intended Title IX's private right of action to encompass claims of a recipient's deliberate indifference to sexual harassment. See generally *Davis*, 526 U. S. 629. Accordingly, if a principal sexually harasses a student, and a teacher complains to the school board but the school board is indifferent, the board would likely be liable for a Title IX violation. See generally *Gebser*, 524 U. S. 274. But if Title IX's private right of action does not encompass retaliation claims, the teacher would have no recourse if he were subsequently fired for speaking out. Without protection from retaliation, individuals who witness discrimination would likely not report it, indiffer-

ence claims would be short circuited, and the underlying discrimination would go unremedied.

Title IX's enforcement scheme also depends on individual reporting because individuals and agencies may not bring suit under the statute unless the recipient has received "actual notice" of the discrimination. *Id.*, at 288, 289–290 (holding that an appropriate official of the funding recipient must have actual knowledge of discrimination and respond with deliberate indifference before a private party may bring suit); 20 U. S. C. § 1682 (providing that a federal agency may terminate funding only after it "has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means"). If recipients were able to avoid such notice by retaliating against all those who dare complain, the statute's enforcement scheme would be subverted. We should not assume that Congress left such a gap in its scheme.

Moreover, teachers and coaches such as Jackson are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators. Indeed, sometimes adult employees are "'the only effective adversar[ies]'" of discrimination in schools. See *Sullivan*, *supra*, at 237 ("[A] white owner is at times 'the only effective adversary' of the unlawful restrictive covenant" (citing *Barrows* v. *Jackson*, 346 U. S. 249, 259 (1953))).

D

The Board is correct in pointing out that, because Title IX was enacted as an exercise of Congress' powers under the Spending Clause, see, *e. g.*, *Davis*, *supra*, at 640; *Gebser*, *supra*, at 287; *Franklin*, 503 U. S., at 74–75, and n. 8, "private damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue," *Davis*, *supra*, at 640. When Congress

enacts legislation under its spending power, that legislation is "in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981). As we have recognized, "[t]here can . . . be no knowing acceptance [of the terms of the contract] if a State is unaware of the conditions [imposed by the legislation on its receipt of funds]." *Ibid.*

The Board insists that we should not interpret Title IX to prohibit retaliation because it was not on notice that it could be held liable for retaliating against those who complain of Title IX violations. We disagree. Funding recipients have been on notice that they could be subjected to private suits for intentional sex discrimination under Title IX since 1979, when we decided *Cannon*. *Pennhurst* does not preclude private suits for intentional acts that clearly violate Title IX. *Davis*, *supra*, at 642.

Indeed, in *Davis*, we held that *Pennhurst* did not pose an obstacle to private suits for damages in cases of a recipient's deliberate indifference to one student's sexual harassment of another, because the deliberate indifference constituted intentional discrimination on the basis of sex. *Davis*, *supra*, at 650. See also *Franklin*, *supra*, at 75 ("Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe"). Similarly, we held in *Gebser* that a recipient of federal funding could be held liable for damages under Title IX for deliberate indifference to a teacher's harassment of a student. 524 U. S., at 287–288. In *Gebser*, as in *Davis*, we acknowledged that federal funding recipients must have notice that they will be held liable for damages. See *Davis*, *supra*, at 642; *Gebser*, *supra*, at 287. But we emphasized that "this limitation on private damages actions is not a bar to liability where a funding recipient intentionally violates the statute." *Davis*, *supra*, at 642 (citing *Franklin*, 503 U. S., at 74–75). See also *ibid.* ("[T]he *[Pennhurst]* notice problem does not

arise in a case such as this, in which intentional discrimination is alleged"); *Bennett* v. *Kentucky Dept. of Ed.*, 470 U. S. 656, 665–666 (1985) (holding that there was sufficient notice under *Pennhurst* where a statute made clear that some conditions were placed on the receipt of federal funds, and stating that Congress need not "specifically identif[y] and proscrib[e]" each condition in the legislation). Simply put, "*Pennhurst* does not bar a private damages action under Title IX where the funding recipient engages in intentional conduct that violates the clear terms of the statute." *Davis*, *supra*, at 642.

Thus, the Board should have been put on notice by the fact that our cases since *Cannon*, such as *Gebser* and *Davis*, have consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination. Indeed, retaliation presents an even easier case than deliberate indifference. It is easily attributable to the funding recipient, and it is always—by definition—intentional. We therefore conclude that retaliation against individuals because they complain of sex discrimination is "intentional conduct that violates the clear terms of the statute," *Davis*, 526 U. S., at 642, and that Title IX itself therefore supplied sufficient notice to the Board that it could not retaliate against Jackson after he complained of discrimination against the girls' basketball team.

The regulations implementing Title IX clearly prohibit retaliation and have been on the books for nearly 30 years. Cf., *e. g.*, *id.*, at 643 (holding that Title IX's regulatory scheme "has long provided funding recipients with notice that they may be liable for their failure to respond to the discriminatory acts of certain nonagents"). More importantly, the Courts of Appeals that had considered the question at the time of the conduct at issue in this case all had already interpreted Title IX to cover retaliation. See, *e. g.*, *Lowrey*, 117 F. 3d, at 252; *Preston*, 31 F. 3d, at 206. The Board could not have realistically supposed that, given this

context, it remained free to retaliate against those who reported sex discrimination. Cf. *Davis*, *supra*, at 644 (stating that the common law of torts "has put schools on notice that they may be held responsible under state law for their failure to protect students from the tortious acts of third parties"). A reasonable school board would realize that institutions covered by Title IX cannot cover up violations of that law by means of discriminatory retaliation.

To prevail on the merits, Jackson will have to prove that the Board retaliated against him *because* he complained of sex discrimination. The amended complaint alleges that the Board retaliated against Jackson for complaining to his supervisor, Ms. Evelyn Baugh, about sex discrimination at Ensley High School. At this stage of the proceedings, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer* v. *Rhodes*, 416 U. S. 232, 236 (1974). Accordingly, the judgment of the Court of Appeals for the Eleventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE THOMAS, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY join, dissenting.

The Court holds that the private right of action under Title IX of the Education Amendments of 1972, for sex discrimination that it implied in *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979), extends to claims of retaliation. Its holding is contrary to the plain terms of Title IX, because retaliatory conduct is not discrimination on the basis of sex. Moreover, we require Congress to speak unambiguously in imposing conditions on funding recipients through its spending power. And, in cases in which a party asserts that a cause of action should be implied, we require that the statute itself evince a plain intent to provide such a cause of action.

Section 901 of Title IX meets none of these requirements. I therefore respectfully dissent.

I

Title IX provides education funding to States, subject to § 901's condition that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U. S. C. § 1681(a). Section 901 does not refer to retaliation. Consequently, the statute prohibits such conduct only if it falls within § 901's prohibition against discrimination "on the basis of sex." It does not.

A claim of retaliation is not a claim of discrimination on the basis of sex. In the context of § 901, the natural meaning of the phrase "on the basis of sex" is on the basis of the plaintiff's sex, not the sex of some other person. See *Leocal* v. *Ashcroft*, 543 U. S. 1, 9 (2004) ("When interpreting a statute, we must give words their ordinary or natural meaning" (internal quotation marks omitted)). For example, suppose a sexist air traffic controller withheld landing permission for a plane because the pilot was a woman. While the sex discrimination against the female pilot no doubt adversely impacted male passengers aboard that plane, one would never say that they were discriminated against "on the basis of sex" by the controller's action.

Congress' usage of the phrase "on the basis of sex" confirms this commonsense conclusion. Even within Title VII of the Civil Rights Act of 1964 itself, Congress used the phrase "on the basis of sex" as a shorthand for discrimination "on the basis of such individual's sex." Specifically, in ensuring that Title VII reached discrimination because of pregnancy, Congress provided that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions." 42 U. S. C. § 2000e(k); cf. *California Fed.*

*Sav. & Loan Assn.* v. *Guerra*, 479 U. S. 272, 277 (1987) (describing how Congress amended Title VII to specify that sex discrimination included discrimination on the basis of pregnancy). The reference to "on the basis of sex" in this provision must refer to Title VII's prohibition on discrimination "because of such individual's . . . sex," suggesting that Congress used the phrases interchangeably. § 2000e–2(a)(1). After all, Title VII's general prohibition against discriminatory employer practices does not use "[t]he terms 'because of sex' or 'on the basis of sex.'" It uses only the phrase "because of such individual's . . . sex." *Ibid.*

This Court has also consistently used the phrase "on the basis of sex" as a shorthand for on the basis of the claimant's sex. See, *e. g.*, *United States* v. *Burke*, 504 U. S. 229, 239 (1992); *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, 64 (1986). Thus, for a disparate-treatment claim to be a claim of discrimination on the basis of sex, the claimant's sex must have "actually played a role in [the decisionmaking] process and had a determinative influence on the outcome," *Hazen Paper Co.* v. *Biggins*, 507 U. S. 604, 610 (1993). Cf. *Teamsters* v. *United States*, 431 U. S. 324, 335, n. 15 (1977) ("'Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or [other protected trait]").

Jackson's assertion that the Birmingham Board of Education (Board) retaliated against him fails to allege sex discrimination in this sense. Jackson does not claim that his own sex played any role, let alone a decisive or predominant one, in the decision to relieve him of his position. Instead, he avers that he complained to his supervisor about sex discrimination against the girls' basketball team and that, sometime subsequent to his complaints, he lost his coaching position. App. 10–11. At best, then, he alleges discrimination "on the basis of sex" founded on the attenuated connection between the supposed adverse treatment and the sex of others. Be-

cause Jackson's claim for retaliation is not a claim that his sex played a role in his adverse treatment, the statute's plain terms do not encompass it.

Jackson's lawsuit therefore differs fundamentally from other examples of sex discrimination, like sexual harassment. *Ante*, at 174–175. A victim of sexual harassment suffers discrimination because of her own sex, not someone else's. Cases in which this Court has held that § 901 reaches claims of vicarious liability for sexual harassment are therefore inapposite here. See, *e. g.*, *Davis* v. *Monroe County Bd. of Ed.*, 526 U. S. 629, 641–649 (1999); *Gebser* v. *Lago Vista Independent School Dist.*, 524 U. S. 274, 277 (1998); *Franklin* v. *Gwinnett County Public Schools*, 503 U. S. 60, 75 (1992). In fact, virtually every case in which this Court has addressed Title IX concerned a claimant who sought to recover for discrimination because of her own sex. *Davis*, *supra*, at 633–635; *National Collegiate Athletic Assn.* v. *Smith*, 525 U. S. 459, 462 (1999); *Gebser*, *supra*, at 277–279; *Franklin*, *supra*, at 63–64; *Mississippi Univ. for Women* v. *Hogan*, 458 U. S. 718, 721 (1982); *North Haven Bd. of Ed.* v. *Bell*, 456 U. S. 512, 517–518 (1982); *Cannon*, 441 U. S., at 680. Again, Jackson makes no such claim.

Moreover, Jackson's retaliation claim lacks the connection to actual sex discrimination that the statute requires. Jackson claims that he suffered reprisal because he *complained about* sex discrimination, not that the sex discrimination underlying his complaint occurred. This feature of Jackson's complaint is not surprising, since a retaliation claimant need not prove that the complained-of sex discrimination happened. Although this Court has never addressed the question, no Court of Appeals requires a complainant to show more than that he had a reasonable, good-faith belief that discrimination occurred to prevail on a retaliation claim.[1]

[1] See, *e. g.*, *Higgins* v. *New Balance Athletic Shoe, Inc.*, 194 F. 3d 252, 262 (CA1 1999); *Gregory* v. *Daly*, 243 F. 3d 687, 701 (CA2 2001); *Aman* v. *Cort Furniture Rental Corp.*, 85 F. 3d 1074, 1085 (CA3 1996); *Byers*

Retaliation therefore cannot be said to be discrimination on the basis of anyone's sex, because a retaliation claim may succeed where no sex discrimination ever took place.

The majority ignores these fundamental characteristics of retaliation claims. Its sole justification for holding that Jackson has suffered sex discrimination is its statement that "retaliation is discrimination 'on the basis of sex' because it is an intentional response to the nature of the complaint: an allegation of sex discrimination." *Ante*, at 174.[2] But the sex-based topic of the complaint cannot overcome the fact that the retaliation is not based on anyone's sex, much less the complainer's sex. For example, if a coach complains to school officials about the dismantling of the men's swimming team, which he honestly and reasonably, but incorrectly, believes is occurring because of the sex of the team, and he is fired, he may prevail. Yet, he would not have been discrimi-

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v. *Dallas Morning News, Inc.*, 209 F. 3d 419, 428 (CA5 2000); *Johnson* v. *University of Cincinnati*, 215 F. 3d 561, 579–580 (CA6 2000); *Talanda* v. *KFC Nat. Management Co.*, 140 F. 3d 1090, 1096 (CA7 1998); *EEOC* v. *HBE Corp.*, 135 F. 3d 543, 554 (CA8 1998); *Moore* v. *California Inst. of Technology Jet Propulsion Lab.*, 275 F. 3d 838, 845, n. 1 (CA9 2002); *Crumpacker* v. *Kansas Dept. of Human Resources*, 338 F. 3d 1163, 1171 (CA10 2003); *Meeks* v. *Computer Assoc. Int'l*, 15 F. 3d 1013, 1021 (CA11 1994); *Parker* v. *Baltimore & Ohio R. Co.*, 652 F. 2d 1012, 1019–1020 (CADC 1981); cf. *Clark County School Dist.* v. *Breeden*, 532 U. S. 268, 271–272 (2001) *(per curiam)* (where no reasonable person could have believed that the incident constituted sex harassment violating Title VII, employee could not prevail on her retaliation claim).

[2] Tellingly, the Court does not adopt the rationale offered by petitioner at oral argument. According to petitioner, "[b]ut for the discrimination on the basis of sex, he would not have complained, and . . . had he not made a complaint about sex discrimination, he would [not] have lost his [coaching] position." Tr. of Oral Arg. 8. This "but for" chain exposes the faulty premise in the position that retaliation is on the basis of sex. The first and necessary step in this chain of causation is that "discrimination on the basis of sex" occurred. Yet, retaliation claims require proving no such thing. Thus, the "but for" link articulated by counsel between "discrimination on the basis of sex" and the adverse employment action does not exist.

nated against on the basis of his sex, for his own sex played no role, and the men's swimming team over which he expressed concern also suffered no discrimination on the basis of sex. In short, no discrimination on the basis of sex has occurred.

At bottom, and petitioner as much as concedes, retaliation is a claim that aids in enforcing another separate and distinct right. Brief for Petitioner 13 (noting the relationship retaliation bears to "primary discrimination"). In other contexts, this Court has recognized that protection from retaliation is separate from direct protection of the primary right and serves as a prophylactic measure to guard the primary right. See *Crawford-El* v. *Britton*, 523 U. S. 574, 588, n. 10 (1998) ("The reason why such retaliation offends the Constitution is that it threatens to inhibit [the] exercise of the protected right").[3] As we explained with regard to Title VII's retaliation prohibition, "a primary purpose of antiretaliation provisions" is "[m]aintaining unfettered access to statutory remedial mechanisms." *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 346 (1997). To describe retaliation as discrimination on the basis of sex is to conflate the enforcement mechanism with the right itself, something for which the statute's text provides no warrant.

Moreover, that the text of Title IX does not mention retaliation is significant. By contrast to Title IX, Congress enacted a separate provision in Title VII to address retaliation, in addition to its general prohibition on discrimination. § 2000e–3(a). Congress' failure to include similar text in Title IX shows that it did not authorize private retaliation actions. This difference cannot be dismissed, as the major-

[3] See also *Great American Fed. Sav. & Loan Assn.* v. *Novotny*, 442 U. S. 366, 387 (1979) (White, J., dissenting) ("Clearly, respondent's right under § 704(a)—to be free from retaliation for efforts to aid others asserting Title VII rights—is distinct from the Title VII right implicated in [this] claim under § 1985(3), which is the right of women employees not to be discriminated against on the basis of their sex").

ity suggests, on the ground that Title VII is a more specific statute in which Congress proscribed particular practices, as opposed to the general prohibition here. *Ante*, at 175. The fact that Congress created those specific prohibitions in Title VII is evidence that it intended to preclude courts from implying similar specific prohibitions in Title IX.

Even apart from Title VII, Congress expressly prohibited retaliation in other discrimination statutes. See, *e. g.*, 42 U. S. C. § 12203(a) (Americans with Disabilities Act of 1990); 29 U. S. C. § 623(d) (Age Discrimination in Employment Act of 1967). If a prohibition on "discrimination" plainly encompasses retaliation, the explicit reference to it in these statutes, as well as in Title VII, would be superfluous—a result we eschew in statutory interpretation. The better explanation is that when Congress intends to include a prohibition against retaliation in a statute, it does so. See *Central Bank of Denver, N. A.* v. *First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 176–177 (1994). Its failure to do so in § 901 is therefore telling.

II

The Court's holding is also inconsistent with two lines of this Court's precedent: Our rule that Congress must speak with a clear voice when it imposes liability on the States through its spending power and our refusal to imply a cause of action when Congress' intent to create a right or a remedy is not evident.

A

As the majority acknowledges, Congress enacted Title IX pursuant to its spending power. *Ante*, at 181 (citing *Davis*, 526 U. S., at 640; *Gebser*, 524 U. S., at 287; *Franklin*, 503 U. S., at 74–75, and n. 8); U. S. Const., Art. 1, § 8, cl. 1. This Court has repeatedly held that the obligations Congress imposes on States in spending power legislation must be clear. Such legislation is "in the nature of a contract" and funding recipients' acceptance of the terms of that contract must be "voluntar[y] and knowin[g]." *Pennhurst State School and*

*Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981); see also *Barnes* v. *Gorman*, 536 U. S. 181, 186 (2002). For their acceptance to be voluntary and knowing, funding recipients must "have notice of their potential liability." *Davis*, 526 U. S., at 641. Thus, "[i]n interpreting language in spending legislation, we . . . 'insis[t] that Congress speak with a clear voice,'" *id.*, at 640 (quoting *Pennhurst*, 451 U. S., at 17), and a condition must be imposed "unambiguously," *ibid.*; *Gonzaga Univ.* v. *Doe*, 536 U. S. 273, 280 (2002); *Barnes*, *supra*, at 186.

The Court's holding casts aside this principle. As I have explained, *supra*, at 185–190, the statute's plain terms do not authorize claims of retaliation. The same analysis shows that, at the least, the statute does not clearly authorize retaliation claims. The majority points out that the statute does not say: "'[N]o person shall be subjected to discrimination on the basis of *such individual's* sex.'" *Ante*, at 179 (emphasis in original). But this reasoning puts the analysis backwards. The question is not whether Congress clearly excluded retaliation claims under Title IX, but whether it clearly included them. The majority's statement at best points to ambiguity in the statute; yet ambiguity is resolved in favor of the States, which must be aware when they accept federal funds of the obligations they thereby agree to assume.

The majority asserts that "the Board should have been put on notice by the fact that our cases since *Cannon*, such as *Gebser* and *Davis*, have consistently interpreted Title IX's private cause of action broadly to encompass diverse forms of intentional sex discrimination." *Ante*, at 183. *Gebser* and *Davis* did not hold or imply that Title IX prohibited "diverse forms of intentional sex discrimination"; they held that schools could be held vicariously liable for sexual harassment committed by students or teachers. See *Gebser*, *supra*, at 277; *Davis*, *supra*, at 633. There was no question that the sexual harassment in those cases was sex discrimination. See *Meritor Savings*, 477 U. S., at 64 ("Without question, when a supervisor sexually harasses a subordinate

because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex"). These cases hardly gave notice to the Board here that retaliation liability loomed.

More important, the Court's rationale untethers notice from the statute. The Board, and other Title IX recipients, must now assume that if conduct can be linked to sex discrimination—no matter how attenuated that link—this Court will impose liability under Title IX. That there is a regulation proscribing retaliation in Title IX administrative enforcement proceedings is no answer, *ante*, at 183, for it says nothing about whether retaliation is discrimination on the basis of sex, much less whether there is a private cause of action for such conduct. Rather than requiring clarity from Congress, the majority requires clairvoyance from funding recipients.

B

Even apart from the clarity we consistently require of obligations imposed by spending power legislation, extending the cause of action implied in *Cannon* to Jackson's claim contradicts the standard we have set for implying causes of action to enforce federal statutes. Whether a statute supplies a cause of action is a matter of statutory interpretation. See *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 568 (1979). We must examine whether the statute creates a right. That right "must be phrased in terms of the person benefited." *Gonzaga*, *supra*, at 284 (internal quotation marks omitted); see also *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U. S. 1083, 1102, 1103 (1991). And our inquiry is not merely whether the statute benefits some class of people, but whether that class includes the plaintiff in the case before us. Our role, then, is not "'to provide such remedies as are necessary to make effective the congressional purpose' expressed by a statute," but to examine the text of what Congress enacted into law. *Alexander* v. *Sandoval*, 532 U. S. 275, 287 (2001) (quoting *J. I. Case Co.* v. *Borak*, 377 U. S.

426, 433 (1964)); *Virginia Bankshares*, *supra*, at 1102; *Touche Ross & Co.*, *supra*, at 578. If the statute evinces no intent to create a right for the plaintiff in the case before us, we should not imply a cause of action.

This Court has held that these principles apply equally when the Court has previously found that the statute in question provides an implied right of action and a party attempts to expand the class of persons or the conduct to which the recognized action applies. *Virginia Bankshares*, *supra*, at 1102. More specifically, this Court has rejected the creation of implied causes of action for ancillary claims like retaliation. In *Central Bank*, we concluded that § 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, as amended, 15 U. S. C. § 78j, provided no civil action against those who aid and abet individuals engaging in manipulative or deceptive practices, though the respondents urged that such a claim was necessary to fulfill the statute's protection against deceit in the securities marketplace. 511 U. S., at 177, 188. We declined to do so even though this Court had implied a cause of action for § 10(b). See *Borak*, *supra*. In our view, while the statute's language potentially reached the conduct of some aiders and abettors, the full scope of liability for aiding and abetting would have extended liability beyond the conduct prohibited by the statute. *Central Bank*, 511 U. S., at 176. We surveyed other statutes and found that "Congress knew how to impose aiding and abetting liability when it chose to do so." *Id.*, at 176–177. Our view that the statute did not reach aiding and abetting was also confirmed by the fact that an "element critical for recovery" in actions against those engaging in fraudulent and manipulative acts was not required in proving that someone had aided and abetted such persons. *Id.*, at 180.

The same reasons militate equally against extending the implied cause of action under Title IX to retaliation claims. As in *Central Bank*, imposing retaliation liability expands the statute beyond discrimination "on the basis of sex" to

instances in which no discrimination on the basis of sex has occurred. Again, § 901 protects individuals only from discrimination on the basis of their own sex. *Supra*, at 185–187. Thus, extending the implied cause of action under Title IX to claims of retaliation expands the class of people the statute protects beyond the specified beneficiaries. As with the absence of aiding and abetting from the statute at issue in *Central Bank*, I find it instructive that § 901 does not expressly prohibit retaliation, while other discrimination statutes do so explicitly. And like the aiding and abetting liability in *Central Bank*, prevailing on a claim of retaliation lacks elements necessary to prevailing on a claim of discrimination on the basis of sex, for no sex discrimination need have occurred.

The majority's reliance on *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229 (1969), is wholly misplaced. *Ante*, at 176–177. Rather than holding that a general prohibition against discrimination permitted a claim of retaliation, *Sullivan* held that a white lessor had standing to assert the right of a black lessee to be free from racial discrimination pursuant to Rev. Stat. § 1978, 42 U. S. C. § 1982. 396 U. S., at 237 ("[T]here can be no question but that Sullivan has standing to maintain this action" (citing *Barrows* v. *Jackson*, 346 U. S. 249 (1953), a standing case)).[4] To make out his third-party claim on behalf of the black lessee, the white lessor would necessarily be required to demonstrate that the defendant had discriminated against the black lessee on the basis of race. Jackson, by contrast, need not show that the sex discrimination forming the basis of his complaints actually occurred. Thus, by recognizing Jackson's claim, the majority creates an entirely new cause of action for a secondary rights holder, beyond the claim of the original rights holder, and

[4] Title 42 U. S. C. § 1982 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

well beyond *Sullivan*. In any event, *Sullivan* involved § 1982, a statute enacted pursuant to Congress' Thirteenth Amendment enforcement power, *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 437–438 (1968), not its spending power. *Sullivan* therefore says nothing about whether Title IX clearly conditions States' receipt of federal funds on retaliation liability.

III

The Court establishes a prophylactic enforcement mechanism designed to encourage whistle-blowing about sex discrimination. The language of Title IX does not support this holding. The majority also offers nothing to demonstrate that its prophylactic rule is necessary to effectuate the statutory scheme. Nothing prevents students—or their parents—from complaining about inequality in facilities or treatment. See, *e. g.*, *Franklin*, 503 U. S., at 63 (student brought suit); *Davis*, 526 U. S., at 633 (suit brought by minor's parent). Under the majority's reasoning, courts may expand liability as they, rather than Congress, see fit. This is no idle worry. The next step is to say that someone closely associated with the complainer, who claims he suffered retaliation for those complaints, likewise has a retaliation claim under Title IX. See 2 Equal Employment Opportunity Commission, Compliance Manual § 8–II, p. 8–10 (1998) ("[I]t would be unlawful for a respondent to retaliate against an employee because his or her spouse, who is also an employee, filed an EEOC charge").

By crafting its own additional enforcement mechanism, the majority returns this Court to the days in which it created remedies out of whole cloth to effectuate its vision of congressional purpose. In doing so, the majority substitutes its policy judgments for the bargains struck by Congress, as reflected in the statute's text. The question before us is only whether Title IX prohibits retaliation, not whether prohibiting it is good policy. *Central Bank*, *supra*, at 177. For

the reasons addressed above, I would hold that § 901 does not encompass private actions for retaliation. I respectfully dissent.

Syllabus

# CITY OF SHERRILL, NEW YORK *v.* ONEIDA INDIAN NATION OF NEW YORK ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 03–855. Argued January 11, 2005—Decided March 29, 2005

Respondent Oneida Indian Nation of New York (OIN or Tribe) is a direct descendant of the Oneida Indian Nation (Oneida Nation), whose aboriginal homeland, at the Nation's birth, comprised some six million acres in what is now central New York State. See, *e. g.*, *Oneida Indian Nation of N. Y.* v. *County of Oneida*, 414 U. S. 661, 664 *(Oneida I)*. In 1788, the State and the Oneida Nation entered into a treaty whereby the Oneidas ceded all their lands to the State, but retained a reservation of about 300,000 acres for their own use. See *County of Oneida* v. *Oneida Indian Nation of N. Y.*, 470 U. S. 226, 231 *(Oneida II)*. The Federal Government initially pursued a policy protective of the New York Indians. In 1790, Congress passed the first Indian Trade and Intercourse Act (Nonintercourse Act), barring sales of tribal land without the Government's acquiescence. And in the 1794 Treaty of Canandaigua, the United States "acknowledge[d]" the Oneidas' 300,000-acre reservation and guaranteed their "free use and enjoyment" of the reserved territory. Act of Nov. 11, 1794, 7 Stat. 44, 45, Art. III. Nevertheless, New York continued to purchase reservation land from the Oneidas. Although the Washington administration objected, later administrations made not even a pretense of interfering with New York's purchases, and ultimately pursued a policy designed to open reservation lands to white settlers and to remove tribes westward. Pressured by the removal policy, many Oneidas left the State. Those who stayed continued to diminish in number and, during the 1840's, sold most of their remaining lands to New York. By 1920, the New York Oneidas retained only 32 acres in the State.

Although early litigation over Oneida land claims trained on monetary recompense from the United States for past deprivations, the Oneidas ultimately shifted to suits against local governments. In 1970, they filed a federal "test case" against two New York counties, alleging that the cession of 100,000 acres to the State in 1795 violated the Nonintercourse Act and thus did not terminate the Oneidas' right to possession. They sought damages measured by the fair rental value, for the years 1968 and 1969, of 872 acres of their ancestral land owned and occupied by the two counties. The District Court, affirmed by the Court of Ap-

peals, dismissed the complaint for failure to state a federal claim. This Court reversed in *Oneida I*, 414 U. S., at 675, 682, holding that federal jurisdiction was properly invoked. After the Oneidas prevailed in the lower courts, this Court held, *inter alia*, that the Oneidas could maintain their claim to be compensated "for violation of their possessory rights based on federal common law," *Oneida II*, 470 U. S., at 236, but reserved "[t]he question whether equitable considerations should limit the relief available to the present day Oneida Indians," *id.*, at 253, n. 27.

In 1997 and 1998, OIN purchased separate parcels of land in petitioner city of Sherrill, New York. These properties, once contained within the historic Oneida Reservation, were last possessed by the Oneidas as a tribal entity in 1805. In that year, the Oneida Nation transferred the parcels to one of its members, who sold the land to a non-Indian in 1807. The properties thereafter remained in non-Indian hands until OIN reacquired them in open-market transactions. For two centuries, governance of the area in which the properties are located has been provided by the State and its county and municipal units. According to the 2000 census, over 99% of the area's present-day population is non-Indian. Nevertheless, because the parcels lie within the boundaries of the reservation originally occupied by the Oneidas, OIN maintained that the properties are tax exempt and accordingly refused to pay property taxes assessed by Sherrill. Sherrill initiated state-court eviction proceedings, and OIN brought this federal-court suit. In contrast to *Oneida I* and *II*, which involved demands for monetary compensation, OIN sought equitable relief prohibiting, currently and in the future, the imposition of property taxes. The District Court concluded that the parcels are not taxable, and the Second Circuit affirmed. In this Court, OIN resists the payment of the property taxes on the ground that OIN's acquisition of fee title to discrete parcels of historic reservation land revived the Oneidas' ancient sovereignty piecemeal over each parcel, so that regulatory authority over the newly purchased properties no longer resides in Sherrill.

*Held:* Given the longstanding, distinctly non-Indian character of central New York and its inhabitants, the regulatory authority over the area constantly exercised by the State and its counties and towns for 200 years, and the Oneidas' long delay in seeking judicial relief against parties other than the United States, standards of federal Indian law and federal equity practice preclude the Tribe from unilaterally reviving its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished governmental reins and cannot regain them through open-market purchases from current titleholders. Pp. 213–221.

Syllabus

(a) The Court rejects the theory of OIN and the United States that, because *Oneida II* recognized the Oneidas' aboriginal title to their ancient reservation land and because the Tribe has now acquired the specific parcels at issue in the open market, it has unified fee and aboriginal title and may now assert sovereign dominion over the parcels. The Oneidas sought only money damages in *Oneida II*, see 470 U. S., at 229, and the Court reserved the question whether "equitable considerations" should limit the relief available to the present-day Oneidas, *id.*, at 253, n. 27. Substantive questions of rights and duties are very different from remedial questions. Here, OIN seeks declaratory and injunctive relief recognizing its present and future sovereign immunity from local taxation on parcels the Tribe purchased in the open market, properties that had been subject to state and local taxation for generations. The appropriateness of such relief must be evaluated in light of the long history of state sovereign control over the territory. From the early 1800's into the 1970's, the United States largely accepted, or was indifferent to, New York's governance of the land in question and the validity *vel non* of the Oneidas' sales to the State. Moreover, the properties here involved have greatly increased in value since the Oneidas sold them 200 years ago. The longstanding assumption of jurisdiction by the State over an area that is predominantly non-Indian in population and land use creates "justifiable expectations." *E. g.*, *Rosebud Sioux Tribe* v. *Kneip*, 430 U. S. 584, 604–605. Similar justifiable expectations, grounded in two centuries of New York's exercise of regulatory jurisdiction, until recently uncontested by OIN, merit heavy weight here. The wrongs of which OIN complains occurred during the early years of the Republic, whereas, for the past two centuries, New York and its local units have continuously governed the territory. The Oneidas did not seek to regain possession of their aboriginal lands by court decree until the 1970's. And not until the 1990's did OIN acquire the properties in question and assert its unification theory to ground its demand for exemption of the parcels from local taxation. This long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude OIN from gaining the disruptive remedy it now seeks. Pp. 213–217.

(b) The distance from 1805 to the present day, the Oneidas' long delay in seeking equitable relief against New York or its local units, and developments in Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate. This Court has long recognized that the passage of time can preclude relief. For example, the doctrine of laches focuses on one side's inaction

and the other's legitimate reliance to bar long-dormant claims for equitable relief. See, *e. g.*, *Badger* v. *Badger*, 2 Wall. 87, 94. Moreover, long acquiescence may have controlling effect on the exercise of States' dominion and sovereignty over territory. *E. g.*, *Ohio* v. *Kentucky*, 410 U. S. 641, 651. This Court's original-jurisdiction state-sovereignty cases do not dictate a result here, but they provide a helpful point of reference: When a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are prime considerations. It has been two centuries since the Oneidas last exercised regulatory control over the properties here or held them free from local taxation. Parcel-by-parcel revival of their sovereign status, given the extraordinary passage of time, would dishonor "the historic wisdom in the value of repose." *Oneida II*, 470 U. S., at 262. Finally, this Court has recognized the impracticability of returning to Indian control land that generations earlier passed into numerous private hands. See, *e. g.*, *Yankton Sioux Tribe* v. *United States*, 272 U. S. 351, 357. The unilateral reestablishment of present and future Indian sovereign control, even over land purchased at the market price, would have disruptive practical consequences similar to those that led the *Yankton Sioux* Court to initiate the impossibility doctrine: Sherrill and the surrounding area are today overwhelmingly populated by non-Indians, and a checkerboard of state and tribal jurisdiction—created unilaterally at OIN's behest—would "seriously burde[n] the administration of state and local governments" and would adversely affect landowners neighboring the tribal patches. *Hagen* v. *Utah*, 510 U. S. 399, 421. If OIN may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent it from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area. See *Felix* v. *Patrick*, 145 U. S. 317, 335. Recognizing these practical concerns, Congress has provided, in 25 U. S. C. § 465, a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well-being. Section 465 provides the proper avenue for OIN to reestablish sovereign authority over territory last held by the Oneidas 200 years ago. Pp. 217–221.

(c) The question of damages for the Tribe's ancient dispossession, resolved in *Oneida II*, is not at issue here, and the Court leaves undisturbed its *Oneida II* holding. P. 221.

337 F. 3d 139, reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, and BREYER,

JJ., joined. SOUTER, J., filed a concurring opinion, *post*, p. 222. STEVENS, J., filed a dissenting opinion, *post*, p. 222.

*Ira S. Sacks* argued the cause for petitioner. With him on the briefs was *Esther S. Trakinski.*

*Caitlin J. Halligan*, Solicitor General of New York, argued the cause for the State of New York as *amicus curiae* urging reversal. With her on the brief were *Eliot Spitzer*, Attorney General, *Daniel Smirlock*, Deputy Solicitor General, *Peter H. Schiff*, *Andrew D. Bing*, Assistant Solicitor General, and *Dwight A. Healy.*

*Michael R. Smith* argued the cause for respondents. With him on the brief were *William W. Taylor III*, *David A. Reiser*, *Thomas B. Mason*, *Richard G. Taranto*, and *Peter D. Carmen.*

*Malcolm L. Stewart* argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Clement*, *Assistant Attorney General Sansonetti*, *Deputy Solicitor General Kneedler*, *Deputy Assistant Attorney General Clark*, *William Lazarus*, *David C. Shilton*, and *Ethan G. Shenkman.**

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*Briefs of *amici curiae* urging reversal were filed for Cayuga and Seneca Counties, New York, et al. by *Gus P. Coldebella*, *William L. Dorr*, *Daniel J. Moore*, and *Brian Laudadio;* for the Town of Lenox, New York, et al. by *Charles G. Curtis, Jr.*, and *E. Joshua Rosenkranz;* for the Counties of Madison and Oneida, New York, by *G. Robert Witmer, Jr.*, *David M. Schraver*, *John J. Field III*, and *Randal B. Caldwell;* and for the Citizens Equal Rights Foundation by *Woodruff Lee Carroll.*

Briefs of *amici curiae* urging affirmance were filed for the Cayuga Nation of New York et al. by *Arlinda F. Locklear*, *Martin R. Gold*, *James T. Meggesto*, *Robert T. Coulter*, *Curtis G. Berkey*, *Marsha K. Schmidt*, *Carey R. Ramos*, and *Jeanne S. Whiteing;* for the Puyallup Tribe of Indians et al. by *Harry R. Sachse*, *Arthur Lazarus, Jr.*, *Richard A. Guest*, *Thomas H. Shipps*, *John Howard Bell*, and *Peter C. Chestnut;* for the National Congress of American Indians by *Carter G. Phillips*, *Virginia A. Seitz*, *Mark E. Haddad*, and *Riyaz A. Kanji;* and for United South and Eastern Tribes, Inc., by *Ian Heath Gershengorn* and *Donald B. Verrilli, Jr.*

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns properties in the city of Sherrill, New York, purchased by the Oneida Indian Nation of New York (OIN or Tribe) in 1997 and 1998. The separate parcels of land in question, once contained within the Oneidas' 300,000-acre reservation, were last possessed by the Oneidas as a tribal entity in 1805. For two centuries, governance of the area in which the properties are located has been provided by the State of New York and its county and municipal units. In *County of Oneida* v. *Oneida Indian Nation of N. Y.*, 470 U. S. 226 (1985) *(Oneida II)*, this Court held that the Oneidas stated a triable claim for damages against the County of Oneida for wrongful possession of lands they conveyed to New York State in 1795 in violation of federal law. In the instant action, OIN resists the payment of property taxes to Sherrill on the ground that OIN's acquisition of fee title to discrete parcels of historic reservation land revived the Oneidas' ancient sovereignty piecemeal over each parcel. Consequently, the Tribe maintains, regulatory authority over OIN's newly purchased properties no longer resides in Sherrill.

Our 1985 decision recognized that the Oneidas could maintain a federal common-law claim for damages for ancient wrongdoing in which both national and state governments were complicit. Today, we decline to project redress for the Tribe into the present and future, thereby disrupting the governance of central New York's counties and towns. Generations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation. And at least since the middle years of the 19th century, most of the Oneidas have resided elsewhere. Given the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneidas' long delay in seeking judicial relief against parties other than the United States, we hold that

the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders.

## I

### A

OIN is a federally recognized Indian Tribe and a direct descendant of the Oneida Indian Nation (Oneida Nation), "one of the six nations of the Iroquois, the most powerful Indian Tribe in the Northeast at the time of the American Revolution." *Id.*, at 230. At the birth of the United States, the Oneida Nation's aboriginal homeland comprised some six million acres in what is now central New York. *Ibid.*; *Oneida Indian Nation of N. Y.* v. *County of Oneida*, 414 U. S. 661, 664 (1974) *(Oneida I)*.

In the years after the Revolutionary War, "the State of New York came under increasingly heavy pressure to open the Oneidas' land for settlement." *Oneida II*, 470 U. S., at 231. Reflective of that pressure, in 1788, New York State and the Oneida Nation entered into the Treaty of Fort Schuyler. For payments in money and kind, the Oneidas ceded to New York "all their lands." App. to Pet. for Cert. A136. Of the vast area conveyed, "[t]he Oneidas retained a reservation of about 300,000 acres," *Oneida II*, 470 U. S., at 231, "for their own use and cultivation," App. to Pet. for Cert. A137 (internal quotation marks omitted).[1] OIN does

[1] Under the "doctrine of discovery," *Oneida II*, 470 U. S. 226, 234 (1985), "fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign—first the discovering European nation and later the original States and the United States," *Oneida I*, 414 U. S. 661, 667 (1974). In the original 13 States, "fee title to Indian lands," or "the pre-emptive right to purchase from the Indians, was in the State." *Id.*, at 670; see *Oneida Indian Nation of N. Y.* v. *New York*, 860 F. 2d 1145, 1159–1167 (CA2 1988). Both before and after the adoption of the Constitution, New York State acquired vast tracts of land from Indian tribes

not here contest the legitimacy of the Fort Schuyler conveyance or the boundaries of the reserved area.

The Federal Government initially pursued a policy protective of the New York Indians, undertaking to secure the Tribes' rights to reserved lands. See *Oneida II*, 470 U. S., at 231–232; *Oneida I*, 414 U. S., at 667; F. Cohen, Handbook of Federal Indian Law 418–419 (1942 ed.); F. Cohen, Handbook of Federal Indian Law 73–74 (1982 ed.) (hereinafter Handbook). In 1790, Congress passed the first Indian Trade and Intercourse Act, commonly known as the Nonintercourse Act. Act of July 22, 1790, ch. 33, 1 Stat. 137. Periodically renewed, see *Oneida I*, 414 U. S., at 667–668, and n. 4, and remaining substantially in force today, see Rev. Stat. § 2116, 25 U. S. C. § 177, the Act bars sales of tribal land without the acquiescence of the Federal Government.[2] In 1794, in further pursuit of its protective policy, the United States entered into the Treaty of Canandaigua with the Six (Iroquois) Nations. Act of Nov. 11, 1794, 7 Stat. 44. That treaty both "acknowledge[d]" the Oneida Reservation as established by

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through treaties it independently negotiated, without National Government participation. See Gunther, Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem of Federal-State Relations, 8 Buffalo L. Rev. 1, 4–6 (1958–1959) (hereinafter Gunther).

[2] By its terms, the 1790 Nonintercourse Act governed Indian lands within the boundaries of the original 13 States. The Act provided "[t]hat no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, *or to any state, whether having the right of pre-emption to such lands or not*, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." Act of July 22, 1790, ch. 33, § 4, 1 Stat. 138 (emphasis added). Our prior decisions state in this regard that, "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." *Oneida II*, 470 U. S., at 234 (citing *Oneida I*, 414 U. S., at 670). See generally Clinton & Hotopp, Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims, 31 Me. L. Rev. 17, 23–38 (1979) (discussing Indian relations under the Articles of Confederation and the Constitution).

the Treaty of Fort Schuyler and guaranteed the Oneidas' "free use and enjoyment" of the reserved territory. *Id.*, at 45, Art. II. The Oneidas in turn agreed they would "never claim any other lands within the boundaries of the United States." *Id.*, at 45, Art. IV.

New York State nonetheless continued to purchase reservation land from the Oneidas. The Washington administration objected to New York's 1795 negotiations to buy 100,000 acres of the Oneidas' Reservation without federal supervision. *Oneida II*, 470 U. S., at 229, 232. Later administrations, however, "[made not] even a pretense of interfer[ing] with [the] State's attempts to negotiate treaties [with the Oneidas] for land cessions." *Oneida Nation of N. Y.* v. *United States*, 43 Ind. Cl. Comm'n 373, 385 (1978); see also *id.*, at 390; Campisi, The Oneida Treaty Period, 1783–1838, in The Oneida Indian Experience: Two Perspectives 48, 59 (J. Campisi & L. Hauptman eds. 1988) (hereinafter Campisi). See generally Gunther 6 ("New York acquired much land from Indians through treaties—perhaps as many as 200—not participated in, though apparently known and not objected to, by the national government." (footnote omitted)).

The Federal Government's policy soon veered away from protection of New York and other east coast reservations. In lieu of the commitment made in the Treaty of Canandaigua, the United States pursued a policy designed to open reservation lands to white settlers and to remove tribes westward. D. Getches, C. Wilkinson, & R. Williams, Cases and Materials on Federal Indian Law 94 (4th ed. 1998) (After the Louisiana Purchase in 1803, federal policymakers "began to debate the tactics of inducing [eastern Indians] to exchange their remaining ancestral lands for a permanent territory in the West."). As recounted by the Indian Claims Commission in 1978, early 19th-century federal Indian agents in New York State did not simply fail to check New York's land purchases, they "took an active role . . . in encouraging the removal of the Oneidas . . . to the west."

*Oneida Nation of N. Y.*, 43 Ind. Cl. Comm'n, at 390; see *id.*, at 391 (noting that some federal agents were "deeply involved" in "plans . . . to bring about the removal of the [Oneidas]" and in the State's acquisition of Oneida land). Beginning in 1817, the Federal Government accelerated its efforts to remove Indian tribes from their east coast homelands. Handbook 78–79, and n. 142.

Pressured by the removal policy to leave their ancestral lands in New York, some 150 Oneidas, by 1825, had moved to Wisconsin. Horsman, The Wisconsin Oneidas in the Preallotment Years, in The Oneida Indian Experience, *supra*, at 65, 67. In 1838, the Oneidas and the United States entered into the Treaty of Buffalo Creek, which envisioned removal of all remaining New York Indians, including the Oneidas, to Kansas. Act of Jan. 15, 1838, 7 Stat. 550. By this time, the Oneidas had sold all but 5,000 acres of their original reservation. 337 F. 3d 139, 149 (CA2 2003). Six hundred of their members resided in Wisconsin, while 620 remained in New York State. 7 Stat. 556 (Sched. A).

In Article 13 of the Buffalo Creek Treaty, the Oneidas agreed to remove to the Kansas lands the United States had set aside for them "as soon as they c[ould] make satisfactory arrangements" for New York State's "purchase of their lands at Oneida." *Id.*, at 554. As a condition of the treaty's ratification, the Senate directed that a federal commissioner "fully and fairly explai[n]" the terms to each signatory tribe and band. *New York Indians* v. *United States*, 170 U. S. 1, 21–22 (1898). Commissioner Ransom H. Gillet, who had originally negotiated the treaty terms with the Oneidas, met with them again and assured them they would not be forced to move but could remain on "their lands *where they reside*," *i. e.*, they could "if they ch[ose] to do so remain *where they are* forever." App. 146 (emphases added).

The Oneidas who stayed on in New York after the proclamation of the Buffalo Creek Treaty continued to diminish in number and, during the 1840's, sold most of their remaining

lands to the State. *New York Indians* v. *United States*, 40 Ct. Cl. 448, 458, 469–471 (1905). A few hundred Oneidas moved to Canada in 1842, *id.*, at 458, and "by the mid-1840s, only about 200 Oneidas remained in New York State," Introduction to Part I, The Oneida Indian Journey: From New York to Wisconsin, 1784–1860, pp. 9, 13 (L. Hauptman & L. McLester eds. 1999). By 1843, the New York Oneidas retained less than 1,000 acres in the State. Campisi 61. That acreage dwindled to 350 in 1890; ultimately, by 1920, only 32 acres continued to be held by the Oneidas. *Ibid.*

The United States eventually abandoned its efforts to remove the New York Indians to Kansas. In 1860, the Federal Government restored the Kansas lands to the public domain, and sold them thereafter. *New York Indians*, 170 U. S., at 24, 28–29, 31.

B

Early litigation concerning the Oneidas' land claims trained on monetary recompense from the United States for past deprivations. In 1893, the United States agreed to be sued for disposing of the Kansas lands to settlers, and the Oneidas in New York shared in the resulting award of damages. See *New York Indians*, 170 U. S. 1; *New York Indians*, 40 Ct. Cl. 448 (identifying the Tribes qualified to share in the distribution of the sum recovered).

Seeking further compensation from the United States a half century later, the New York and Wisconsin Oneidas initiated proceedings before the Indian Claims Commission in 1951. *Oneida Indian Nation of N. Y.* v. *County of Oneida*, 622 F. 2d 624, 626 (CA2 1980). They sought redress for lands New York had acquired through 25 treaties of cession concluded between 1795 and 1846. The Oneidas alleged, and the Claims Commission agreed, that under the Nonintercourse Act of 1790 and successor statutes, the Federal Government had a fiduciary duty to ensure that the Oneidas received from New York "conscionable consideration" for the lands in question. *Oneida Nation of N. Y.* v. *United States*,

26 Ind. Cl. Comm'n 138, 145 (1971). The Court of Claims affirmed the Commission's core determination, but held that the United States' duty extended only to land transactions of which the Government had knowledge. *United States* v. *Oneida Nation of N. Y.*, 201 Ct. Cl. 546, 554, 477 F. 2d 939, 944 (1973). Accordingly, the Court of Claims directed the Commission to determine whether the Government actually or constructively knew of the land transactions at issue. *Id.*, at 555, 477 F. 2d, at 945.

On remand, the Commission found that the Federal Government had actual or constructive knowledge of all of the treaties and would be liable if the Oneidas had not received conscionable consideration. *Oneida Nation of N. Y.*, 43 Ind. Cl. Comm'n, at 375, 406–407. The Commission anticipated further proceedings to determine the Federal Government's ultimate liability, but the Oneidas had by then decided to pursue a different course. On the Oneidas' request, the Court of Claims dismissed the proceedings. See *Oneida Nation of N. Y.* v. *United States*, 231 Ct. Cl. 990, 991 (1982) *(per curiam)*.

In lieu of concentrating on recovery from the United States, the Oneidas pursued suits against local governments. In 1970, the Oneidas of New York and Wisconsin, asserting federal-question jurisdiction under 28 U. S. C. § 1331 or § 1362, instituted a "test case" against the New York Counties of Oneida and Madison. They alleged that the cession of 100,000 acres to New York State in 1795, see *supra*, at 205, violated the Nonintercourse Act and thus did not terminate the Oneidas' right to possession under the applicable federal treaties and statutes. In this initial endeavor to gain compensation from governmental units other than the United States, the Oneidas confined their demand for relief. They sought only damages measured by the fair rental value, for the years 1968 and 1969, of 872 acres of their ancestral land owned and occupied by the two counties. The District Court, affirmed by the Court of Appeals, dismissed the Onei-

das' complaint for failure to state a claim arising under federal law. We reversed that determination, holding that federal jurisdiction was properly invoked. *Oneida I*, 414 U. S., at 675, 682.

In the next round, the Oneidas prevailed in the lower courts. On review in *Oneida II*, we rejected various defenses the counties presented that might have barred the action for damages, 470 U. S., at 240–250, and held that the Oneidas could maintain their claim to be compensated "for violation of their possessory rights based on federal common law," *id.*, at 236. While upholding the judgment of the Court of Appeals regarding the counties' liability under federal common law, we noted that "[t]he question whether equitable considerations should limit the relief available to the present day Oneida Indians was not addressed by the Court of Appeals or presented to this Court." *Id.*, at 253, n. 27. Accordingly, "we express[ed] no opinion as to whether other considerations m[ight] be relevant to the final disposition of this case." *Ibid.* On remand, the District Court entered a final judgment which fixed the amount of damages payable by the counties. Allowing setoffs for the counties' good-faith improvements to the land, the court ordered recoveries of $15,994 from Oneida County and $18,970 from Madison County, plus prejudgment interest. *Oneida Indian Nation of N. Y.* v. *County of Oneida*, 217 F. Supp. 2d 292, 310 (NDNY 2002).

In 2000, litigation resumed in an action held in abeyance during the pendency of the test case. In that revitalized action, the Oneidas sought damages from Oneida and Madison Counties for a period spanning over 200 years. The amended complaint alleged that, through a series of agreements concluded during the years 1795 to 1846, approximately 250,000 acres of the Oneidas' ancestral land had been unlawfully conveyed to New York. *Oneida Indian Nation of N. Y.* v. *County of Oneida*, 199 F. R. D. 61, 66–68 (NDNY 2000).

The Oneidas further sought to enlarge the action by demanding recovery of land they had not occupied since the 1795–1846 conveyances.[3] They attempted to join as defendants, *inter alia*, approximately 20,000 private landowners, and to obtain declaratory relief that would allow the Oneidas to eject these landowners. *Id.*, at 67–68.[4] The District Court refused permission to join the landowners so late in the day, resting in part on the Oneidas' bad faith and undue delay. *Id.*, at 79–85. Further, the court found the proposed amendment "futile." *Id.*, at 94. In this regard, the court emphasized the "sharp distinction between the *existence* of a federal common law right to Indian homelands," a right this Court recognized in *Oneida II*, "and how to *vindicate* that right." 199 F. R. D., at 90. That distinction "must be drawn," the court stated, *ibid.*, for in the two centuries since the alleged wrong, "development of every type imaginable

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[3] In contrast, *United States* v. *Boylan*, 265 F. 165 (CA2 1920), involved land the Oneidas never left. *Boylan* concerned the 1885 conveyances by individual Oneida Indians of a 32-acre tract of reservation land to non-Indians. Despite the conveyances, a band of Oneidas continued to live on the land. After a non-Indian gained a state-court order ejecting the remaining Oneidas, the United States brought suit on behalf of the Oneidas to reclaim the land. The Second Circuit observed that the Oneidas were "actually in possession" of the 32 acres in question, *id.*, at 167, and had occupied the land continuously for over a century, *id.*, at 171. Given that occupation and the absence of Federal Government approval for the individual Oneidas' conveyances, the Second Circuit upheld the District Court's "decree restoring the ejected Indians to possession." *Id.*, at 173–174.

[4] In another lawsuit, commenced in 1978, the Oneidas sought from the State of New York and others both damages and recovery of land New York had purchased from the Oneidas in 1785 and 1788. *Oneida Indian Nation of N. Y.*, 860 F. 2d, at 1148. The Second Circuit affirmed the District Court's dismissal of that action, holding that treaties between New York and the Oneidas during the years in which the Articles of Confederation were operative did not require the assent of Congress. *Id.*, at 1167; see *supra*, at 203–204, n. 1.

has been ongoing," *id.*, at 92. Referring to the "practical concerns" that blocked restoration of Indians to their former lands, the court found it high time "to transcend the theoretical." *Ibid.* Cases of this genre, the court observed, "cr[ied] out for a pragmatic approach." *Ibid.* The District Court therefore excluded the imposition of any liability against private landowners. *Id.*, at 93–95.

This brings us to the present case, which concerns parcels of land in the city of Sherrill, located in Oneida County, New York. According to the 2000 census, over 99% of the population in the area is non-Indian: American Indians represent less than 1% of the city of Sherrill's population and less than 0.5% of Oneida County's population. U. S. Dept. of Commerce, Census Bureau, 2000 Census of Population and Housing, Summary Population and Housing Characteristics: New York, 2000 PHC–1–34, Table 3, p. 124 (July 2002), available at http://www.census.gov/prod/cen2000/phc-1-34.pdf (as visited Mar. 24, 2005, and available in Clerk of Court's case file). OIN owns approximately 17,000 acres of land scattered throughout the Counties of Oneida and Madison, representing less than 1.5% of the counties' total area. OIN's predecessor, the Oneida Nation, had transferred the parcels at issue to one of its members in 1805, who sold the land to a non-Indian in 1807. The properties thereafter remained in non-Indian hands until OIN's acquisitions in 1997 and 1998 in open-market transactions. See 337 F. 3d, at 144, n. 3. OIN now operates commercial enterprises on these parcels: a gasoline station, a convenience store, and a textile facility. *Id.*, at 144.

Because the parcels lie within the boundaries of the reservation originally occupied by the Oneidas, OIN maintained that the properties are exempt from taxation, and accordingly refused to pay the assessed property taxes. The city of Sherrill initiated eviction proceedings in state court, and OIN sued Sherrill in federal court. In contrast to *Oneida I*

and *II*, which involved demands for monetary compensation, OIN sought equitable relief prohibiting, currently and in the future, the imposition of property taxes. OIN also sued Madison County, seeking a declaration that the Tribe's properties in Madison are tax exempt. The litigation involved a welter of claims and counterclaims. Relevant here, the District Court concluded that parcels of land owned by the Tribe in Sherrill and Madison are not taxable. See 145 F. Supp. 2d 226, 254–259 (NDNY 2001).

A divided panel of the Second Circuit affirmed. 337 F. 3d 139. Writing for the majority, Judge Parker ruled that the parcels qualify as "Indian country," as that term is defined in 18 U. S. C. § 1151,[5] because they fall within the boundaries of a reservation set aside by the 1794 Canandaigua Treaty for Indian use under federal supervision. 337 F. 3d, at 155–156; see *supra*, at 204–205. The court further held that the Buffalo Creek Treaty did not demonstrate a clear congressional purpose to disestablish or diminish the Oneida Reservation. 337 F. 3d, at 161, 165; see *supra*, at 206. Finally, the court found no legal requirement "that a federally recognized tribe demonstrate its continuous existence in order to assert a claim to its reservation land." 337 F. 3d, at 165. In any case, the court held, the record demonstrated OIN's continuous tribal existence. *Id.*, at 166–167. Judge Van Graafeiland dissented as to the majority's primary holding. In his view, the record raised a substantial question whether OIN had "forfeited" its aboriginal rights to the land because it abandoned "its tribal existence . . . for a discernable period of time." *Id.*, at 171.

We granted the city of Sherrill's petition for a writ of certiorari, 542 U. S. 936 (2004), and now reverse the judgment of the Court of Appeals.

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[5] Titled "Indian country defined," 18 U. S. C. § 1151 provides, in relevant part, that "the term 'Indian country' . . . means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government."

## II

OIN and the United States argue that because the Court in *Oneida II* recognized the Oneidas' aboriginal title to their ancient reservation land and because the Tribe has now acquired the specific parcels involved in this suit in the open market, it has unified fee and aboriginal title and may now assert sovereign dominion over the parcels. Brief for Respondents 1, 12–19; Brief for United States as *Amicus Curiae* 9–10. When the Oneidas came before this Court 20 years ago in *Oneida II*, they sought money damages only. 470 U. S., at 229; see also *id.*, at 244, n. 16 (recognizing that the suit was an "action at law"). The Court reserved for another day the question whether "equitable considerations" should limit the relief available to the present-day Oneidas. *Id.*, at 253, n. 27; *supra*, at 209.[6]

"The substantive questions whether the plaintiff has any right or the defendant has any duty, and if so what it is, are very different questions from the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is." D. Dobbs, Law of Remedies § 1.2, p. 3 (1973); see also *Navajo Tribe of Indians* v. *New Mexico*, 809 F. 2d 1455, 1467 (CA10 1987) ("The distinction between a claim or substantive right and a remedy is fundamental."). "[S]tandards of federal Indian law and federal equity practice" led the District Court, in the litigation revived after *Oneida II*, see *supra*, at 210–211, to reject OIN's plea for ejectment of 20,000 private landowners. *Oneida Indian Nation of N. Y.*, 199 F. R. D., at 90 (internal quotation marks omitted); *ibid.* ("[T]here is a sharp distinction between the *existence* of a federal common law right to Indian homelands and how to *vindicate* that right . . . ."). In this action,

[6] The United States acknowledged in its brief to the Court in *Oneida II* that equitable considerations unaddressed by the Court of Appeals in that suit might limit the relief available to the present-day Oneidas. Brief for United States as *Amicus Curiae* in *County of Oneida* v. *Oneida Indian Nation of N. Y.*, O. T. 1984, No. 83–1065 etc., pp. 33–40.

OIN seeks declaratory and injunctive relief recognizing its present and future sovereign immunity from local taxation on parcels of land the Tribe purchased in the open market, properties that had been subject to state and local taxation for generations.[7] We now reject the unification theory of OIN and the United States and hold that "standards of federal Indian law and federal equity practice" preclude the Tribe from rekindling embers of sovereignty that long ago grew cold.[8]

The appropriateness of the relief OIN here seeks must be evaluated in light of the long history of state sovereign control over the territory. From the early 1800's into the 1970's, the United States largely accepted, or was indifferent to, New York's governance of the land in question and the validity *vel non* of the Oneidas' sales to the State. See generally Gunther 23–25 (attributing much of the confusion and conflict in the history of New York Indian affairs to "Federal inattention and ambivalence"). In fact, the United States' policy and practice through much of the early 19th century was designed to dislodge east coast lands from Indian pos-

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[7] The dissent suggests that, compatibly with today's decision, the Tribe may assert tax immunity defensively in the eviction proceeding initiated by Sherrill. *Post*, at 225. We disagree. The equitable cast of the relief sought remains the same whether asserted affirmatively or defensively.

[8] We resolve this case on considerations not discretely identified in the parties' briefs. But the question of equitable considerations limiting the relief available to OIN, which we reserved in *Oneida II*, is inextricably linked to, and is thus "fairly included" within, the questions presented. See this Court's Rule 14.1(a) ("The statement of any question presented is deemed to comprise every subsidiary question fairly included therein."); *Ballard* v. *Commissioner*, *ante*, at 47, n. 2; *R. A. V.* v. *St. Paul*, 505 U. S. 377, 381, n. 3 (1992). See generally R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 414 (8th ed. 2002) ("Questions not explicitly mentioned but essential to analysis of the decisions below or to the correct disposition of the other issues have been treated as subsidiary issues fairly comprised by the question presented." (internal quotation marks omitted)).

session. See *supra*, at 205–207. Moreover, the properties here involved have greatly increased in value since the Oneidas sold them 200 years ago. Notably, it was not until lately that the Oneidas sought to regain ancient sovereignty over land converted from wilderness to become part of cities like Sherrill. See *supra*, at 210–212; *Oneida II*, 470 U. S., at 264–265 (STEVENS, J., dissenting in part).

This Court has observed in the different, but related, context of the diminishment of an Indian reservation that "[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use," may create "justifiable expectations." *Rosebud Sioux Tribe* v. *Kneip*, 430 U. S. 584, 604–605 (1977); accord *Hagen* v. *Utah*, 510 U. S. 399, 421 (1994) ("jurisdictional history" and "the current population situation . . . demonstrat[e] a practical acknowledgment" of reservation diminishment; "a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area" (internal quotation marks omitted)).[9] Similar justifiable expectations, grounded in two centuries of New York's exercise of regula-

[9] The Court has recognized that "only Congress can divest a reservation of its land and diminish its boundaries." *Solem* v. *Bartlett*, 465 U. S. 463, 470 (1984); see also 18 U. S. C. § 1151 (defining Indian country); *South Dakota* v. *Yankton Sioux Tribe*, 522 U. S. 329, 343 (1998) ("[O]nly Congress can alter the terms of an Indian treaty by diminishing a reservation."). The Court need not decide today whether, contrary to the Second Circuit's determination, the 1838 Treaty of Buffalo Creek disestablished the Oneidas' Reservation, as Sherrill argues. See Brief for Petitioner 31–39; *Oneida II*, 470 U. S., at 269, n. 24 (STEVENS, J., dissenting in part) ("There is . . . a serious question whether the Oneida did not abandon their claim to the aboriginal lands in New York when they accepted the Treaty of Buffalo Creek of 1838 . . . ."). The relief OIN seeks—recognition of present and future sovereign authority to remove the land from local taxation—is unavailable because of the long lapse of time, during which New York's governance remained undisturbed, and the present-day and future disruption such relief would engender.

tory jurisdiction, until recently uncontested by OIN, merit heavy weight here.[10]

The wrongs of which OIN complains in this action occurred during the early years of the Republic. For the past two centuries, New York and its county and municipal units have continuously governed the territory. The Oneidas did not seek to regain possession of their aboriginal lands by court decree until the 1970's. See *supra*, at 210, n. 4. And not until the 1990's did OIN acquire the properties in question and assert its unification theory to ground its demand for exemption of the parcels from local taxation. 337 F. 3d, at 144.[11] This long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the

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[10] Citing *Montana* v. *Blackfeet Tribe*, 471 U. S. 759 (1985), *The Kansas Indians*, 5 Wall. 737 (1867), and *The New York Indians*, 5 Wall. 761 (1867), the dissent notes that only Congress may revoke the tax-exempt status of Indian reservation land. *Post*, at 224, and n. 3. Those cases, however, concerned land the Indians had continuously occupied. See Brief for Respondents in *Montana* v. *Blackfeet Tribe*, O. T. 1984, No. 83–2161, p. 3, and n. 1 (noting Indians' occupation of reservation); *Kansas Indians*, 5 Wall., at 738–742 (concerning Indians removed to and residing on Kansas lands before statehood); *New York Indians*, 5 Wall., at 768 (taxation by State would "interfer[e] with the possession, and occupation, and exercise of authority" by the Indians residing on the reservation). The Oneidas last occupied the parcels here at issue in 1805. See *supra*, at 211. The dissent additionally refers to *Cass County* v. *Leech Lake Band of Chippewa Indians*, 524 U. S. 103 (1998). *Post*, at 224, n. 3. But in that case, the Court held that an Indian tribe could not revive the tax-exempt status of its former reservation lands—which Congress had expressly removed from federal protection—by reacquiring the lands in the open market. 524 U. S., at 113–114.

[11] The fact that OIN brought this action promptly after acquiring the properties does not overcome the Oneidas' failure to reclaim ancient prerogatives earlier or lessen the problems associated with upsetting New York's long-exercised sovereignty over the area. OIN's claim concerns grave, but ancient, wrongs, and the relief available must be commensurate with that historical reality.

character of the properties, preclude OIN from gaining the disruptive remedy it now seeks.

The principle that the passage of time can preclude relief has deep roots in our law, and this Court has recognized this prescription in various guises. It is well established that laches, a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims for equitable relief. See, *e. g.*, *Badger* v. *Badger*, 2 Wall. 87, 94 (1865) ("[C]ourts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights." (internal quotation marks omitted)); *Wagner* v. *Baird*, 7 How. 234, 258 (1849) (same); *Bowman* v. *Wathen*, 1 How. 189, 194 (1843) ("[The] doctrine of an equitable bar by lapse of time, so distinctly announced by the chancellors of England and Ireland, . . . should now be regarded as settled law in this court.").

This Court applied the doctrine of laches in *Felix* v. *Patrick*, 145 U. S. 317 (1892), to bar the heirs of an Indian from establishing a constructive trust over land their Indian ancestor had conveyed in violation of a statutory restriction. In the nearly three decades between the conveyance and the lawsuit, "[a] large part of the tract ha[d] been platted and recorded as an addition to the city of Omaha, and . . . sold to purchasers." *Id.*, at 326. "[A]s the case stands at present," the Court observed, "justice requires only what the law . . . would demand—the repayment of the value of the [illegally conveyed] scrip." *Id.*, at 334. The Court also recognized the disproportion between the value of the scrip issued to the Indian ($150) and the value of the property the heirs sought to acquire (over $1 million). *Id.*, at 333. The sort of changes to the value and character of the land noted by the *Felix* Court are present in even greater magnitude in this suit. Cf. *Galliher* v. *Cadwell*, 145 U. S. 368, 373 (1892) ("[L]aches is not . . . a mere matter of time; but principally

a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties.").

As between States, long acquiescence may have controlling effect on the exercise of dominion and sovereignty over territory. *Ohio* v. *Kentucky*, 410 U. S. 641, 651 (1973) ("The rule, long-settled and never doubted by this court, is that long acquiescence by one state in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority." (quoting *Michigan* v. *Wisconsin*, 270 U. S. 295, 308 (1926))); *Massachusetts* v. *New York*, 271 U. S. 65, 95 (1926) ("Long acquiescence in the possession of territory and the exercise of dominion and sovereignty over it may have a controlling effect in the determination of a disputed boundary."). The acquiescence doctrine does not depend on the original validity of a boundary line; rather, it attaches legal consequences to acquiescence in the observance of the boundary. *California* v. *Nevada*, 447 U. S. 125, 131 (1980) (No relationship need exist "between the *origins* of a boundary and the legal *consequences* of acquiescence in that boundary. . . . Longstanding acquiescence by California and Nevada can give [the boundary lines] the force of law whether or not federal authorities had the power to draw them.").

This Court's original-jurisdiction state-sovereignty cases do not dictate a result here, but they provide a helpful point of reference: When a party belatedly asserts a right to present and future sovereign control over territory,[12] longstanding observances and settled expectations are prime considerations. There is no dispute that it has been two centuries since the Oneidas last exercised regulatory control over the properties here or held them free from local taxation.

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[12] It bears repetition that for generations, the Oneidas dominantly complained, not against New York or its local units, but about "[mis]treatment at the hands of the United States Government." *Oneida II*, 470 U. S., at 269 (STEVENS, J., dissenting in part); see *supra*, at 207–208.

Parcel-by-parcel revival of their sovereign status, given the extraordinary passage of time, would dishonor "the historic wisdom in the value of repose." *Oneida II*, 470 U. S., at 262 (STEVENS, J., dissenting in part).

Finally, this Court has recognized the impracticability of returning to Indian control land that generations earlier passed into numerous private hands. See *Yankton Sioux Tribe* v. *United States*, 272 U. S. 351, 357 (1926) ("It is impossible . . . to rescind the cession and restore the Indians to their former rights because the lands have been opened to settlement and large portions of them are now in the possession of innumerable innocent purchasers . . . ."); *Felix*, 145 U. S., at 334 (observing, in declining to award equitable relief, "[t]hat which was wild land thirty years ago is now intersected by streets, subdivided into blocks and lots, and largely occupied by persons who have bought upon the strength of Patrick's title, and have erected buildings of a permanent character"). The District Court, in the litigation dormant during the pendency of *Oneida II*, see *supra*, at 209–211, rightly found these pragmatic concerns about restoring Indian sovereign control over land "magnified exponentially here, where development of every type imaginable has been ongoing for more than two centuries." *Oneida Indian Nation of N. Y.*, 199 F. R. D., at 92.

In this case, the Court of Appeals concluded that the "impossibility" doctrine had no application because OIN acquired the land in the open market and does not seek to uproot current property owners. 337 F. 3d, at 157. But the unilateral reestablishment of present and future Indian sovereign control, even over land purchased at the market price, would have disruptive practical consequences similar to those that led this Court in *Yankton Sioux* to initiate the impossibility doctrine. The city of Sherrill and Oneida County are today overwhelmingly populated by non-Indians. See *supra*, at 211. A checkerboard of alternating state and tribal jurisdiction in New York State—created unilaterally

at OIN's behest—would "seriously burde[n] the administration of state and local governments" and would adversely affect landowners neighboring the tribal patches. *Hagen*, 510 U. S., at 421 (quoting *Solem* v. *Bartlett*, 465 U. S. 463, 471–472, n. 12 (1984)). If OIN may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area. See *Felix*, 145 U. S., at 335 ("decree prayed for in this case, if granted, would offer a distinct encouragement to . . . similar claims"); cf. *Brendale* v. *Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408, 433–437 (1989) (opinion of STEVENS, J.) (discussing tribal land-use controls); *post*, at 226, n. 6 (STEVENS, J., dissenting) (noting that "the balance of interests" supports continued state zoning jurisdiction).[13]

Recognizing these practical concerns, Congress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well-being. Title 25 U. S. C. § 465 authorizes the Secretary of the Interior to acquire land in trust for Indians and provides that the land "shall be exempt from State and local taxation." See *Cass County* v. *Leech Lake Band of Chippewa Indians*, 524 U. S. 103, 114–115 (1998). The regulations implementing § 465 are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over

[13] Other tribal entities have already sought to free historic reservation lands purchased in the open market from local regulatory controls. See *Seneca-Cayuga Tribe of Okla.* v. *Aurelius, New York*, No. 5:03–CV–00690 (NPM), 2004 WL 1945359, *1–*3 (NDNY, Sept. 1, 2004) (tribe seeks declaratory and injunctive relief to avoid application of municipal zoning and land-use laws to 229 acres); *Cayuga Indian Nation of N. Y.* v. *Union Springs*, 317 F. Supp. 2d 128, 131–134, 147–148 (NDNY 2004) (granting declaratory and injunctive relief to tribe, to block application of zoning regulations to property—"located within 300 yards" of a school—under renovation by the tribe for use as a gaming facility).

territory. Before approving an acquisition, the Secretary must consider, among other things, the tribe's need for additional land; "[t]he purposes for which the land will be used"; "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls"; and "[j]urisdictional problems and potential conflicts of land use which may arise." 25 CFR § 151.10(f) (2004). Section 465 provides the proper avenue for OIN to reestablish sovereign authority over territory last held by the Oneidas 200 years ago.

In sum, the question of damages for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II*. However, the distance from 1805 to the present day, the Oneidas' long delay in seeking equitable relief against New York or its local units, and developments in the city of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate.[14]

* * *

For the reasons stated, the judgment of the Court of Appeals for the Second Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

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[14] JUSTICE STEVENS, after vigorously urging the application of laches to block further proceedings in *Oneida II*, 470 U. S., at 255, now faults the Court for rejecting the claim presented here, *post*, at 223–224. The majority indicated in *Oneida II* that application of a nonstatutory time limitation in an action for damages would be "novel." 470 U. S., at 244, n. 16; cf. *id.*, at 261–262 (STEVENS, J., dissenting in part) (acknowledging "the application of a traditional equitable defense in an action at law is something of a novelty"). No similar novelty exists when the specific relief OIN now seeks would project redress for the Tribe into the present and future. The claim to a sovereign's prerogative asserted by OIN, we hold, does "not survive eternally," *id.*, at 272 (STEVENS, J., dissenting in part); rather, it is a claim "best left in repose," *id.*, at 273 (same).

JUSTICE SOUTER, concurring.

I join the opinion of the Court with one qualification that goes to the appropriateness of considering the long dormancy of any claim to tribal authority over the parcels in question, as a basis to hold that the Oneida Indian Nation is not now immune from the taxing authority of local government. The Tribe's claim, whether affirmative or defensive, see *ante*, at 214, n. 7, is one of territorial sovereign status entitled to recognition by the territorial state sovereign and its subdivisions. The claim of present sovereign status turns not only on background law and the provisions of treaties, but also on the Tribe's behavior over a long period of time: the absence of the Tribe and tribal members from the particular lots of land, and the Tribe's failure to assert sovereignty over them. The Tribe's inaction cannot, therefore, be ignored here as affecting only a remedy to be considered later; it is, rather, central to the very claims of right made by the contending parties. Since the subject of inaction was not expressly raised as a separate question presented for review, see *ante*, at 214, n. 8, there is some question whether we should order reargument before dealing with it. I think that is unnecessary; the issue was addressed by each side in the argument prior to submission of the case, notwithstanding the terms of the questions on which review was granted.

JUSTICE STEVENS, dissenting.

This case involves an Indian tribe's claim to tax immunity on its own property located within its reservation. It does not implicate the tribe's immunity from other forms of state jurisdiction, nor does it concern the tribe's regulatory authority over property owned by non-Indians within the reservation.

For the purposes of its decision the Court assumes that the District Court and the Court of Appeals correctly resolved the major issues of fact and law that the parties debated in those courts and that the city of Sherrill (City) pre-

sented to us in its petition for certiorari. Thus, we accept those courts' conclusions that the Oneida Indian Nation of New York (Tribe) is a federally recognized Indian Tribe; that it is the successor-in-interest to the original Oneida Nation; that in 1788 the Treaty of Fort Schuyler created a 300,000-acre reservation for the Oneida; that in 1794 the Treaty of Canandaigua established that tract as a federally protected reservation; and that the reservation was not disestablished or diminished by the Treaty of Buffalo Creek in 1838. It is undisputed that the City seeks to collect property taxes on parcels of land that are owned by the Tribe and located within the historic boundaries of its reservation.

Since the outset of this litigation it has been common ground that if the Tribe's properties are "Indian Country," the City has no jurisdiction to tax them without express congressional consent.[1] For the reasons set forth at length in the opinions of the District Court and the Court of Appeals, it is abundantly clear that all of the land owned by the Tribe within the boundaries of its reservation qualifies as Indian country. Without questioning the accuracy of that conclusion, the Court today nevertheless decides that the fact that most of the reservation has been occupied and governed by non-Indians for a long period of time precludes the Tribe "from rekindling embers of sovereignty that long ago grew cold." *Ante*, at 214. This is a novel holding, and in my judgment even more unwise than the Court's holding in *County of Oneida* v. *Oneida Indian Nation of N. Y.*, 470 U. S. 226 (1985), that the Tribe may recover damages for the alleged illegal conveyance of its lands that occurred in 1795. In that case, I argued that the "remedy for the ancient wrong established at trial should be provided by Congress, not by judges seeking to rewrite history at this late date," *id.*, at 270 (opinion dissenting in part). In the present case, the

[1] The District Court noted that "[n]o argument is made that should a finding be made that the properties in question are Indian Country, they are nonetheless taxable." 145 F. Supp. 2d 226, 241, n. 7 (NDNY 2001).

Tribe is not attempting to collect damages or eject landowners as a remedy for a wrong that occurred centuries ago; rather, it is invoking an ancient immunity against a city's present-day attempts to tax its reservation lands.

Without the benefit of relevant briefing from the parties, the Court has ventured into legal territory that belongs to Congress. Its decision today is at war with at least two bedrock principles of Indian law. First, only Congress has the power to diminish or disestablish a tribe's reservation.[2] Second, as a core incident of tribal sovereignty, a tribe enjoys immunity from state and local taxation of its reservation lands, until that immunity is explicitly revoked by Congress.[3] Far from revoking this immunity, Congress has specifically reconfirmed it with respect to the reservation lands of the New York Indians.[4] Ignoring these principles, the Court

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[2] See *South Dakota* v. *Yankton Sioux Tribe*, 522 U. S. 329, 343 (1998) ("Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights. Accordingly, only Congress can alter the terms of an Indian treaty by diminishing a reservation, and its intent to do so must be 'clear and plain'" (citations omitted)); *Solem* v. *Bartlett*, 465 U. S. 463, 470 (1984) ("Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise").

[3] See *Montana* v. *Blackfeet Tribe*, 471 U. S. 759, 764–765 (1985) (noting that the Court has "never wavered" from the view that a State's attempt to tax Indian reservation land is illegal and inconsistent with Indian title (citing *The Kansas Indians*, 5 Wall. 737 (1867), and *The New York Indians*, 5 Wall. 761 (1867))); *Cass County* v. *Leech Lake Band of Chippewa Indians*, 524 U. S. 103, 110 (1998) ("We have consistently declined to find that Congress has authorized such taxation unless it has '"made its intention to do so unmistakably clear"'").

[4] In providing New York state courts with jurisdiction over civil actions between Indians, Congress emphasized that the statute was not to be "construed as subjecting the lands within any Indian reservation in the State of New York to taxation for State or local purposes." 25 U. S. C. §233. See *Oneida Indian Nation of N. Y.* v. *County of Oneida*, 414 U. S. 661, 680–681, n. 15 (1974) ("'The text and history of the new legislation are replete with indications that congressional consent is necessary to vali-

has done what only Congress may do—it has effectively proclaimed a diminishment of the Tribe's reservation and an abrogation of its elemental right to tax immunity. Under our precedents, whether it is wise policy to honor the Tribe's tax immunity is a question for Congress, not this Court, to decide.

As a justification for its lawmaking decision, the Court relies heavily on the fact that the Tribe is seeking *equitable* relief in the form of an injunction. The distinction between law and equity is unpersuasive because the outcome of the case turns on a narrow legal issue that could just as easily, if not most naturally, be raised by a tribe as a *defense* against a state collection proceeding. In fact, that scenario actually occurred in this case: The City brought an eviction proceeding against the Tribe based on its refusal to pay property taxes; that proceeding was removed to federal court and consolidated with the present action; the District Court granted summary judgment for the Tribe; and the Court of Appeals affirmed on the basis of tribal tax immunity.[5] Either this

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date the exercise of state power over tribal Indians and, most significantly, that New York cannot unilaterally deprive Indians of their tribal lands or authorize such deprivations. The civil jurisdiction law, to make assurance doubly sure, contains a proviso that explicitly exempts reservations from state and local taxation . . . . Moreover, both federal and state officials agreed that the bills would retain ultimate federal power over the Indians and that federal guardianship, particularly with respect to property rights, would continue'" (quoting Gunther, Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem of Federal-State Relations, 8 Buffalo L. Rev. 1, 16 (1958–1959))).

[5] See 337 F. 3d 139, 167 (CA2 2003). Additionally, to the extent that we are dealing with genuine equitable defenses, these defenses are subject to waiver. Here, the City sought to add the defense of laches to its answer; the District Court refused on the ground of futility, 145 F. Supp. 2d, at 259; the Court of Appeals upheld this determination, 337 F. 3d, at 168–169; and the City failed to preserve this point in its petition for certiorari or brief on the merits. The City similarly failed to preserve its impossibility defense in its submissions to this Court, and there is no indication that the City ever raised an acquiescence defense in the proceedings below.

defensive use of tax immunity should still be available to the Tribe on remand, but see *ante*, at 214, n. 7, or the Court's reliance on the distinctions between law and equity and between substantive rights and remedies, see *ante*, at 213–214, is indefensible.

In any event, as a matter of equity I believe that the "principle that the passage of time can preclude relief," *ante*, at 217, should be applied sensibly and with an even hand. It seems perverse to hold that the reliance interests of non-Indian New Yorkers that are predicated on almost two centuries of inaction by the Tribe do not foreclose the Tribe's enforcement of judicially created damages remedies for ancient wrongs, but do somehow mandate a forfeiture of a tribal immunity that has been consistently and uniformly protected throughout our history. In this case, the Tribe reacquired reservation land in a peaceful and lawful manner that fully respected the interests of innocent landowners—it purchased the land on the open market. To now deny the Tribe its right to tax immunity—at once the most fundamental of tribal rights and the least disruptive to other sovereigns—is not only inequitable, but also irreconcilable with the principle that only Congress may abrogate or extinguish tribal sovereignty. I would not decide this case on the basis of speculation about what may happen in future litigation over other regulatory issues.[6] For the answer to the ques-

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[6] It is not necessary to engage in any speculation to recognize that the majority's fear of opening a Pandora's box of tribal powers is greatly exaggerated. Given the State's strong interest in zoning its land without exception for a small number of Indian-held properties arranged in checkerboard fashion, the balance of interests obviously supports the retention of state jurisdiction in this sphere. See *California* v. *Cabazon Band of Mission Indians*, 480 U. S. 202, 215 (1987) ("'[I]n exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members'"). Nor, as the Tribe acknowledges, Brief for Respondents 19, n. 4, could it credibly assert the right to tax or exercise other regulatory authority over reservation land owned by non-Indians. See *Atkinson Trading Co.* v. *Shirley*, 532 U. S. 645 (2001); *Strate* v. *A–1 Contractors*, 520

tion whether the City may require the Tribe to pay taxes on its own property within its own reservation is pellucidly clear. Under settled law, it may not.

Accordingly, I respectfully dissent.

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U. S. 438, 456 (1997) (denying tribal jurisdiction in part because the Tribe could not "assert a landowner's right to occupy and exclude" over the land in question); see also *Brendale* v. *Confederated Tribes and Bands of Yakima Nation*, 492 U. S. 408, 444–445 (1989) (opinion of STEVENS, J.) ("Because the Tribe no longer has the power to exclude nonmembers from a large portion of this area, it also lacks the power to define the essential character of the territory [through zoning]").

Syllabus

# SMITH ET AL. *v.* CITY OF JACKSON, MISSISSIPPI, ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 03–1160. Argued November 3, 2004—Decided March 30, 2005

In revising its employee pay plan, respondent City granted raises to all police officers and police dispatchers in an attempt to bring their starting salaries up to the regional average. Officers with less than five years' service received proportionately greater raises than those with more seniority, and most officers over 40 had more than five years of service. Petitioners, a group of older officers, filed suit under the Age Discrimination in Employment Act of 1967 (ADEA), claiming, *inter alia*, that they were adversely affected by the plan because of their age. The District Court granted the City summary judgment. Affirming, the Fifth Circuit ruled that disparate-impact claims are categorically unavailable under the ADEA, but it assumed that the facts alleged by petitioners would entitle them to relief under *Griggs* v. *Duke Power Co.*, 401 U. S. 424, which announced a disparate-impact theory of recovery for cases brought under Title VII of the Civil Rights Act of 1964 (Title VII).

*Held:* The judgment is affirmed.

351 F. 3d 183, affirmed.

JUSTICE STEVENS delivered the opinion of the Court with respect to Parts I, II, and IV, concluding:

1. The ADEA authorizes recovery in disparate-impact cases comparable to *Griggs*. Except for the substitution of "age" for "race, color, religion, sex, or national origin," the language of ADEA § 4(a)(2) and Title VII § 703(a)(2) is identical. Unlike Title VII, however, ADEA § 4(f)(1) significantly narrows its coverage by permitting any "otherwise prohibited" action "where the differentiation is based on reasonable factors other than age" (hereinafter RFOA provision). Pp. 232–233.

2. Petitioners have not set forth a valid disparate-impact claim. Two textual differences between the ADEA and Title VII make clear that the disparate-impact theory's scope is narrower under the ADEA than under Title VII. One is the RFOA provision. The other is the amendment to Title VII in the Civil Rights Act of 1991, which modified this Court's *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642, holding that narrowly construed the scope of liability on a disparate-impact theory. Because the relevant 1991 amendments expanded Title VII's coverage

Syllabus

but did not amend the ADEA or speak to age discrimination, *Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA. Congress' decision to limit the ADEA's coverage by including the RFOA provision is consistent with the fact that age, unlike Title VII's protected classifications, not uncommonly has relevance to an individual's capacity to engage in certain types of employment. Here, petitioners have done little more than point out that the pay plan is relatively less generous to older workers than to younger ones. They have not, as required by *Wards Cove*, identified any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers. Further, the record makes clear that the City's plan was based on reasonable factors other than age. The City's explanation for the differential between older and younger workers was its perceived need to make junior officers' salaries competitive with comparable positions in the market. Thus, the disparate impact was attributable to the City's decision to give raises based on seniority and position. Reliance on these factors is unquestionably reasonable given the City's goal. Pp. 240–243.

JUSTICE STEVENS, joined by JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER, concluded in Part III that the ADEA's text, the RFOA provision, and Equal Employment Opportunity Commission (EEOC) regulations all support the conclusion that a disparate-impact theory is cognizable under the ADEA. Pp. 233–240.

JUSTICE SCALIA concluded that the reasoning in Part III of JUSTICE STEVENS' opinion is a basis for deferring, pursuant to *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, to the EEOC's reasonable view that the ADEA authorizes disparate-impact claims. Pp. 243–247.

JUSTICE O'CONNOR, joined by JUSTICE KENNEDY and JUSTICE THOMAS, concluded that the judgment should be affirmed on the ground that disparate impact claims are not cognizable under the ADEA. Pp. 247–268.

STEVENS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and IV, in which SCALIA, SOUTER, GINSBURG, and BREYER, JJ., joined, and an opinion with respect to Part III, in which SOUTER, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 243. O'CONNOR, J., filed an opinion concurring in the judgment, in which KENNEDY and THOMAS, JJ., joined, *post*, p. 247. REHNQUIST, C. J., took no part in the decision of the case.

*Thomas C. Goldstein* argued the cause for petitioners. With him on the briefs were *Amy Howe*, *Pamela S. Karlan*, and *Dennis L. Horn*.

*Glen D. Nager* argued the cause for respondents. With him on the brief were *Michael A. Carvin*, *Louis K. Fisher*, *Terry Wallace*, and *Samuel L. Begley*.*

JUSTICE STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and IV, and an opinion with respect to Part III, in which JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join.

Petitioners, police and public safety officers employed by the city of Jackson, Mississippi (hereinafter City), contend that salary increases received in 1999 violated the Age Discrimination in Employment Act of 1967 (ADEA) because they were less generous to officers over the age of 40 than to younger officers. Their suit raises the question whether the "disparate-impact" theory of recovery announced in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), for cases brought under Title VII of the Civil Rights Act of 1964, is cognizable under the ADEA. Despite the age of the ADEA, it is a question that we have not yet addressed. See *Hazen*

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*Briefs of *amici curiae* urging reversal were filed for the Academy of Florida Trial Lawyers by *John G. Crabtree;* for the Cornell University Chapter of the American Association of University Professors et al. by *Michael Evan Gold;* and for the National Employment Lawyers Association et al. by *Cathy Ventrell-Monsees* and *Adele P. Kimmel.*

Briefs of *amici curiae* urging affirmance were filed for the California Employment Law Council by *Paul Grossman*, *Paul W. Cane, Jr.*, and *Neal D. Mollen;* for the Chamber of Commerce of the United States of America by *Peter Buscemi*, *Anne Brafford*, *Mark Dichter*, *Stephen A. Bokat*, and *Robin S. Conrad;* for the Equal Employment Advisory Council by *Ann Elizabeth Reesman;* for the National League of Cities et al. by *Richard Ruda* and *James I. Crowley;* and for the Pacific Legal Foundation by *John H. Findley.*

*Laurie A. McCann*, *Daniel B. Kohrman*, and *Melvin Radowitz* filed a brief for AARP et al. as *amici curiae.*

*Paper Co.* v. *Biggins*, 507 U. S. 604, 610 (1993); *Markham* v. *Geller*, 451 U. S. 945 (1981) (REHNQUIST, J., dissenting from denial of certiorari).

I

On October 1, 1998, the City adopted a pay plan granting raises to all City employees. The stated purpose of the plan was to "attract and retain qualified people, provide incentive for performance, maintain competitiveness with other public sector agencies and ensure equitable compensation to all employees regardless of age, sex, race and/or disability."[1] On May 1, 1999, a revision of the plan, which was motivated, at least in part, by the City's desire to bring the starting salaries of police officers up to the regional average, granted raises to all police officers and police dispatchers. Those who had less than five years of tenure received proportionately greater raises when compared to their former pay than those with more seniority. Although some officers over the age of 40 had less than five years of service, most of the older officers had more.

Petitioners are a group of older officers who filed suit under the ADEA claiming both that the City deliberately discriminated against them because of their age (the "disparate-treatment" claim) and that they were "adversely affected" by the plan because of their age (the "disparate-impact" claim). The District Court granted summary judgment to the City on both claims. The Court of Appeals held that the ruling on the former claim was premature because petitioners were entitled to further discovery on the issue of intent, but it affirmed the dismissal of the disparate-impact claim. 351 F. 3d 183 (CA5 2003). Over one judge's dissent, the majority concluded that disparate-impact claims are categorically unavailable under the ADEA. Both the majority and the dissent assumed that the facts alleged by petitioners would entitle them to relief under the reasoning of *Griggs*.

[1] App. 15.

We granted the officers' petition for certiorari, 541 U. S. 958 (2004), and now hold that the ADEA does authorize recovery in "disparate-impact" cases comparable to *Griggs*. Because, however, we conclude that petitioners have not set forth a valid disparate-impact claim, we affirm.

## II

During the deliberations that preceded the enactment of the Civil Rights Act of 1964, Congress considered and rejected proposed amendments that would have included older workers among the classes protected from employment discrimination.[2] *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U. S. 581, 587 (2004). Congress did, however, request the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected." § 715, 78 Stat. 265. The Secretary's report, submitted in response to Congress' request, noted that there was little discrimination arising from dislike or intolerance of older people, but that "arbitrary" discrimination did result from certain age limits. Report of the Secretary of Labor, The Older American Worker: Age Discrimination in Employment 5 (June 1965), reprinted in U. S. Equal Employment Opportunity Commission, Legislative History of the Age Discrimination in Employment Act (1981), Doc. No. 5 (hereinafter Wirtz Report). Moreover, the report observed that discriminatory effects resulted from "[i]nstitutional arrangements that indirectly restrict the employment of older workers." *Id.*, at 15.

In response to that report Congress directed the Secretary to propose remedial legislation, see Fair Labor Standards Amendments of 1966, Pub. L. 89–601, § 606, 80 Stat. 845, and

[2] See 110 Cong. Rec. 2596–2599 (1964) (amendment offered by Rep. Dowdy, voted down 123 to 94); *id.*, at 9911–9913, 13490–13492 (amendment offered by Sen. Smathers, voted down 63 to 28).

then acted favorably on his proposal. As enacted in 1967, § 4(a)(2) of the ADEA, now codified as 29 U. S. C. § 623(a)(2), provided that it shall be unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . . ." 81 Stat. 603. Except for substitution of the word "age" for the words "race, color, religion, sex, or national origin," the language of that provision in the ADEA is identical to that found in § 703(a)(2) of the Civil Rights Act of 1964 (Title VII). Other provisions of the ADEA also parallel the earlier statute.[3] Unlike Title VII, however, § 4(f)(1) of the ADEA, 81 Stat. 603, contains language that significantly narrows its coverage by permitting any "otherwise prohibited" action "where the differentiation is based on reasonable factors other than age" (hereinafter RFOA provision).

## III

In determining whether the ADEA authorizes disparate-impact claims, we begin with the premise that when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes. *Northcross* v. *Board of Ed. of Memphis City Schools*, 412 U. S. 427, 428 (1973) *(per curiam)*. We have consistently applied

[3] Like Title VII with respect to all protected classes except race, the ADEA provides an affirmative defense to liability where age is "a bona fide occupational qualification reasonably necessary to the normal operation of the particular business . . . ." § 4(f)(1), 81 Stat. 603. Cf. Civil Rights Act of 1964, § 703(e), 78 Stat. 256 ("Notwithstanding any other provision of this title, . . . it shall not be [unlawful to perform any of the prohibited activities in §§ 703(a)–(d)] on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ").

that presumption to language in the ADEA that was "derived *in haec verba* from Title VII." *Lorillard* v. *Pons*, 434 U. S. 575, 584 (1978).[4] Our unanimous interpretation of § 703(a)(2) of Title VII in *Griggs* is therefore a precedent of compelling importance.

In *Griggs*, a case decided four years after the enactment of the ADEA, we considered whether § 703 of Title VII prohibited an employer "from requiring a high school education or passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when (a) neither standard is shown to be significantly related to successful job performance, (b) both requirements operate to disqualify Negroes at a substantially higher rate than white applicants, and (c) the jobs in question formerly had been filled only by white employees as part of a longstanding practice of giving preference to whites." 401 U. S., at 425–426. Accepting the Court of Appeals' conclusion that the employer had adopted the diploma and test requirements without any intent to discriminate, we held that good faith "does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.*, at 432.

We explained that Congress had "directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Ibid.* We relied on the fact that history is "filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but

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[4] *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750, 756 (1979) (interpreting § 14(b) of the ADEA in light of § 706(c) of Title VII); *Western Air Lines, Inc.* v. *Criswell*, 472 U. S. 400, 416 (1985) (interpreting ADEA's bona fide occupational qualification exception in light of Title VII's BFOQ exception); *Trans World Airlines, Inc.* v. *Thurston*, 469 U. S. 111, 121 (1985) (interpreting the ADEA to apply to denial of privileges cases in a similar manner as under Title VII).

Congress has mandated the commonsense proposition that they are not to become masters of reality." *Id.*, at 433. And we noted that the Equal Employment Opportunity Commission (EEOC), which had enforcement responsibility, had issued guidelines that accorded with our view. *Id.*, at 433–434. We thus squarely held that § 703(a)(2) of Title VII did not require a showing of discriminatory intent.[5]

While our opinion in *Griggs* relied primarily on the purposes of the Act, buttressed by the fact that the EEOC had endorsed the same view, we have subsequently noted that our holding represented the better reading of the statutory text as well. See *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 991 (1988). Neither § 703(a)(2) nor the comparable language in the ADEA simply prohibits actions that "limit, segregate, or classify" persons; rather the language prohibits such actions that "deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's" race or age. *Ibid.* (explaining that in disparate-impact cases, "the employer's practices may be said to 'adversely affect [an individual's status] as an employee'" (alteration in original) (quoting 42

[5] The congressional purposes on which we relied in *Griggs* have a striking parallel to two important points made in the Wirtz Report. Just as the *Griggs* opinion ruled out discrimination based on racial animus as a problem in that case, the Wirtz Report concluded that there was no significant discrimination of that kind so far as older workers are concerned. Wirtz Report 6. And just as *Griggs* recognized that the high school diploma requirement, which was unrelated to job performance, had an unfair impact on African-Americans who had received inferior educational opportunities in segregated schools, 401 U. S., at 430, the Wirtz Report identified the identical obstacle to the employment of older workers. "Any formal employment standard which requires, for example, a high school diploma will obviously work against the employment of many older workers—unfairly if, despite his limited schooling, an older worker's years of experience have given him the relevant equivalent of a high school education." Wirtz Report 3. Thus, just as the statutory text is identical, there is a remarkable similarity between the congressional goals we cited in *Griggs* and those present in the Wirtz Report.

U. S. C. § 2000e–2(a)(2))). Thus the text focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer.[6]

*Griggs*, which interpreted the identical text at issue here, thus strongly suggests that a disparate-impact theory should be cognizable under the ADEA.[7] Indeed, for over two dec-

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[6] In reaching a contrary conclusion, JUSTICE O'CONNOR ignores key textual differences between § 4(a)(1), which does not encompass disparate-impact liability, and § 4(a)(2). Paragraph (a)(1) makes it unlawful for an employer "to fail or refuse to hire . . . *any individual* . . . because of *such individual's* age." (Emphasis added.) The focus of the paragraph is on the employer's actions with respect to the targeted individual. Paragraph (a)(2), however, makes it unlawful for an employer "to limit . . . his *employees* in any way which would deprive or tend to deprive *any individual* of employment opportunities or otherwise adversely affect *his* status as an employee, because of *such individual's* age." (Emphasis added.) Unlike in paragraph (a)(1), there is thus an incongruity between the employer's actions—which are focused on his employees generally—and the individual employee who adversely suffers because of those actions. Thus, an employer who classifies his employees without respect to age may still be liable under the terms of this paragraph if such classification adversely affects the employee because of that employee's age—the very definition of disparate impact. JUSTICE O'CONNOR is therefore quite wrong to suggest that the textual differences between the two paragraphs are unimportant.

[7] JUSTICE O'CONNOR reaches a contrary conclusion based on the text of the statute, the legislative history, and the structure of the statute. As we explain above, n. 6, *supra*, her textual reasoning is not persuasive. Further, while Congress may have intended to remedy disparate-impact-type situations through "noncoercive measures" in part, there is nothing to suggest that it intended such measures to be the sole method of achieving the desired result of remedying practices that had an adverse effect on older workers. Finally, we agree that the differences between age and the classes protected in Title VII are relevant, and that Congress might well have intended to treat the two differently. See *post*, at 253 (O'CONNOR, J., concurring in judgment). However, Congress obviously considered those classes of individuals to be sufficiently similar to warrant enacting identical legislation, at least with respect to employment practices it sought to prohibit. While those differences, *coupled with a difference in the text of the statute* such as the RFOA provision, may warrant addressing disparate-impact claims in the two statutes differently, see *infra*, at

ades after our decision in *Griggs*, the Courts of Appeals uniformly interpreted the ADEA as authorizing recovery on a "disparate-impact" theory in appropriate cases.[8] It was only after our decision in *Hazen Paper Co.* v. *Biggins*, 507 U. S. 604 (1993), that some of those courts concluded that the ADEA did not authorize a disparate-impact theory of liability.[9] Our opinion in *Hazen Paper*, however, did not address or comment on the issue we decide today. In that case, we held that an employee's allegation that he was discharged shortly before his pension would have vested did not state a cause of action under a *disparate-treatment* theory. The motivating factor was not, we held, the employee's age, but rather his years of service, a factor that the ADEA did not prohibit an employer from considering when termi-

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240–241, it does not justify departing from the plain text and our settled interpretation of that text.

[8] B. Lindemann & D. Kadue, Age Discrimination in Employment Law 416, and n. 16 (2003) (citing *Holt* v. *Gamewell Corp.*, 797 F. 2d 36, 37 (CA1 1986); *Maresco* v. *Evans Chemetics*, 964 F. 2d 106, 115 (CA2 1992); *Blum* v. *Witco Chemical Corp.*, 829 F. 2d 367, 372 (CA3 1987); *Wooden* v. *Board of Ed. of Jefferson Cty., Ky.*, 931 F. 2d 376, 379 (CA6 1991); *Monroe* v. *United Airlines*, 736 F. 2d 394, 404, n. 3 (CA7 1984); *Dace* v. *ACF Industries*, 722 F. 2d 374, 378 (CA8 1983), modified, 728 F. 2d 976 (1984) *(per curiam)*; *Palmer* v. *United States*, 794 F. 2d 534, 536 (CA9 1986); *Faulkner* v. *Super Valu Stores, Inc.*, 3 F. 3d 1419 (CA10 1993) (assuming disparate-impact theory); *MacPherson* v. *University of Montevallo*, 922 F. 2d 766, 771 (CA11 1991); *Arnold* v. *United States Postal Serv.*, 863 F. 2d 994, 998 (CADC 1988) (assuming disparate-impact theory)).

[9] See, *e. g.*, *Mullin* v. *Raytheon Co.*, 164 F. 3d 696, 700 (CA1 1999) ("[T]ectonic plates shifted when the Court decided *[Hazen Paper]*"); *Gantt* v. *Wilson Sporting Goods Co.*, 143 F. 3d 1042, 1048 (CA6 1998) ("[T]here is now considerable doubt as to whether a claim of age discrimination may exist under a disparate-impact theory" (internal quotation marks omitted)). See also Lindemann & Kadue, Age Discrimination in Employment Law, at 417–418, n. 23 (collecting cases). In contrast to the First, Seventh, Tenth, and Eleventh Circuits, which have held that there is no disparate-impact theory, the Second, Eighth, and Ninth Circuits continue to recognize such a theory. *Id.*, at 417, and n. 22.

nating an employee. *Id.*, at 612.[10] While we noted that disparate treatment "captures the essence of what Congress sought to prohibit in the ADEA," *id.*, at 610, we were careful to explain that we were not deciding "whether a disparate impact theory of liability is available under the ADEA . . . ," *ibid.* In sum, there is nothing in our opinion in *Hazen Paper* that precludes an interpretation of the ADEA that parallels our holding in *Griggs*.

The Court of Appeals' categorical rejection of disparate-impact liability, like JUSTICE O'CONNOR's, rested primarily on the RFOA provision and the majority's analysis of legislative history. As we have already explained, we think the history of the enactment of the ADEA, with particular reference to the Wirtz Report, supports the pre-*Hazen Paper* consensus concerning disparate-impact liability. And *Hazen Paper* itself contains the response to the concern over the RFOA provision.

The RFOA provision provides that it shall not be unlawful for an employer "to take any action otherwise prohibited under subsectio[n] (a) . . . where the differentiation is based on reasonable factors other than age [discrimination] . . . ." 81 Stat. 603. In most disparate-treatment cases, if an employer in fact acted on a factor other than age, the action would not be prohibited under subsection (a) in the first place. See *Hazen Paper*, 507 U. S., at 609 ("[T]here is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age"). In those disparate-treatment cases, such as in *Hazen Paper* itself, the RFOA provision is simply unnecessary to avoid liability under the ADEA, since there was no prohibited action in the first place. The RFOA provision is not, as JUSTICE O'CONNOR suggests, a "safe harbor from liability," *post*, at 252 (emphasis deleted), since there would

[10] We did note, however, that the challenged conduct was actionable under § 510 of the Employee Retirement Income Security Act of 1974. 507 U. S., at 612.

be no liability under § 4(a). See *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 254 (1981) (noting, in a Title VII case, that an employer can defeat liability by showing that the employee was rejected for "a legitimate, nondiscriminatory reason" without reference to an RFOA provision).

In disparate-impact cases, however, the allegedly "otherwise prohibited" activity is not based on age. *Ibid.* ("[C]laims that stress 'disparate impact' [by contrast] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another . . . " (quoting *Teamsters* v. *United States*, 431 U. S. 324, 335–336, n. 15 (1977))). It is, accordingly, in cases involving disparate-impact claims that the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was "reasonable." Rather than support an argument that disparate impact is unavailable under the ADEA, the RFOA provision actually supports the contrary conclusion.[11]

Finally, we note that both the Department of Labor, which initially drafted the legislation, and the EEOC, which is the agency charged by Congress with responsibility for implementing the statute, 29 U. S. C. § 628, have consistently interpreted the ADEA to authorize relief on a disparate-impact theory. The initial regulations, while not mentioning disparate impact by name, nevertheless permitted such claims if the employer relied on a factor that was not related to age. 29 CFR § 860.103(f)(1)(i) (1970) (barring physical fitness requirements that were not "reasonably necessary for the spe-

[11] We note that if Congress intended to prohibit all disparate-impact claims, it certainly could have done so. For instance, in the Equal Pay Act of 1963, 29 U. S. C. § 206(d)(1), Congress barred recovery if a pay differential was based "on any other factor"—reasonable or unreasonable—"other than sex." The fact that Congress provided that employers could use only *reasonable* factors in defending a suit under the ADEA is therefore instructive.

cific work to be performed"). See also § 1625.7 (2004) (setting forth the standards for a disparate-impact claim).

The text of the statute, as interpreted in *Griggs*, the RFOA provision, and the EEOC regulations all support petitioners' view. We therefore conclude that it was error for the Court of Appeals to hold that the disparate-impact theory of liability is categorically unavailable under the ADEA.

## IV

Two textual differences between the ADEA and Title VII make it clear that even though both statutes authorize recovery on a disparate-impact theory, the scope of disparate-impact liability under ADEA is narrower than under Title VII. The first is the RFOA provision, which we have already identified. The second is the amendment to Title VII contained in the Civil Rights Act of 1991, 105 Stat. 1071. One of the purposes of that amendment was to modify the Court's holding in *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642 (1989), a case in which we narrowly construed the employer's exposure to liability on a disparate-impact theory. See Civil Rights Act of 1991, § 2, 105 Stat. 1071. While the relevant 1991 amendments expanded the coverage of Title VII, they did not amend the ADEA or speak to the subject of age discrimination. Hence, *Wards Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA.

Congress' decision to limit the coverage of the ADEA by including the RFOA provision is consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment. To be sure, Congress recognized that this is not always the case, and that society may perceive those differences to be larger or more consequential than they are in fact. However, as Secretary Wirtz noted in his report, "certain circumstances . . . unquestionably affect older workers more strongly, as a

group, than they do younger workers." Wirtz Report 11. Thus, it is not surprising that certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group. Moreover, intentional discrimination on the basis of age has not occurred at the same levels as discrimination against those protected by Title VII. While the ADEA reflects Congress' intent to give older workers employment opportunities whenever possible, the RFOA provision reflects this historical difference.

Turning to the case before us, we initially note that petitioners have done little more than point out that the pay plan at issue is relatively less generous to older workers than to younger workers. They have not identified any specific test, requirement, or practice within the pay plan that has an adverse impact on older workers. As we held in *Wards Cove*, it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is "'responsible for isolating and identifying the *specific* employment practices that are allegedly responsible for any observed statistical disparities.'" 490 U. S., at 656 (quoting *Watson*, 487 U. S., at 994; emphasis added). Petitioners have failed to do so. Their failure to identify the specific practice being challenged is the sort of omission that could "result in employers being potentially liable for 'the myriad of innocent causes that may lead to statistical imbalances . . . .'" 490 U. S., at 657. In this case not only did petitioners thus err by failing to identify the relevant practice, but it is also clear from the record that the City's plan was based on reasonable factors other than age.

The plan divided each of five basic positions—police officer, master police officer, police sergeant, police lieutenant, and deputy police chief—into a series of steps and half-steps. The wage for each range was based on a survey of comparable communities in the Southeast. Employees were then assigned a step (or half-step) within their position that corres-

ponded to the lowest step that would still give the individual a 2% raise. Most of the officers were in the three lowest ranks; in each of those ranks there were officers under age 40 and officers over 40. In none did their age affect their compensation. The few officers in the two highest ranks are all over 40. Their raises, though higher in dollar amount than the raises given to junior officers, represented a smaller percentage of their salaries, which of course are higher than the salaries paid to their juniors. They are members of the class complaining of the "disparate impact" of the award.

Petitioners' evidence established two principal facts: First, almost two-thirds (66.2%) of the officers under 40 received raises of more than 10% while less than half (45.3%) of those over 40 did.[12] Second, the average percentage increase for the entire class of officers with less than five years of tenure was somewhat higher than the percentage for those with more seniority.[13] Because older officers tended to occupy more senior positions, on average they received smaller increases when measured as a percentage of their salary. The basic explanation for the differential was the City's perceived need to raise the salaries of junior officers to make them competitive with comparable positions in the market.

Thus, the disparate impact is attributable to the City's decision to give raises based on seniority and position. Reliance on seniority and rank is unquestionably reasonable given the City's goal of raising employees' salaries to match those in surrounding communities. In sum, we hold that the City's decision to grant a larger raise to lower echelon employees for the purpose of bringing salaries in line with that of surrounding police forces was a decision based on a "reasonable facto[r] other than age" that responded to the City's legitimate goal of retaining police officers. Cf. *MacPherson* v. *University of Montevallo*, 922 F. 2d 766, 772 (CA11 1991).

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[12] Exh. C, Record 1192.

[13] App. to Pet. for Cert. 41a.

While there may have been other reasonable ways for the City to achieve its goals, the one selected was not unreasonable. Unlike the business necessity test, which asks whether there are other ways for the employer to achieve its goals that do not result in a disparate impact on a protected class, the reasonableness inquiry includes no such requirement.

Accordingly, while we do not agree with the Court of Appeals' holding that the disparate-impact theory of recovery is never available under the ADEA, we affirm its judgment.

*It is so ordered.*

THE CHIEF JUSTICE took no part in the decision of this case.

JUSTICE SCALIA, concurring in part and concurring in the judgment.

I concur in the judgment of the Court, and join all except Part III of its opinion. As to that Part, I agree with all of the Court's reasoning, but would find it a basis, not for independent determination of the disparate-impact question, but for deferral to the reasonable views of the Equal Employment Opportunity Commission (EEOC or Commission) pursuant to *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984). See *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U. S. 581, 601–602 (2004) (SCALIA, J., dissenting).

This is an absolutely classic case for deference to agency interpretation. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. §621 *et seq.*, confers upon the EEOC authority to issue "such rules and regulations as it may consider necessary or appropriate for carrying out" the ADEA. §628. Pursuant to this authority, the EEOC promulgated, after notice-and-comment rulemaking, see 46 Fed. Reg. 47724, 47727 (1981), a regulation that reads as follows:

> "When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity." 29 CFR § 1625.7(d) (2004).

The statement of the EEOC which accompanied publication of the agency's final interpretation of the ADEA said the following regarding this regulation: "Paragraph (d) of § 1625.7 has been rewritten to make it clear that employment criteria that are age-neutral on their face but which nevertheless have a disparate impact on members of the protected age group must be justified as a business necessity. *See Laugesen* v. *Anaconda Corp.*, 510 F. 2d 307 (6th Cir. 1975); *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971)." 46 Fed. Reg., at 47725. The regulation affirmed, moreover, what had been the longstanding position of the Department of Labor, the agency that previously administered the ADEA, see *ante*, at 239; 29 CFR § 860.103(f)(1)(i) (1970). And finally, the Commission has appeared in numerous cases in the lower courts, both as a party and as *amicus curiae*, to defend the position that the ADEA authorizes disparate-impact claims.[1] Even under the unduly constrained standards of agency deference recited in *United States* v. *Mead Corp.*, 533

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[1] See, *e. g.*, Brief for EEOC as *Amicus Curiae* Supporting Plaintiffs-Appellees in *Meacham* v. *Knolls Atomic Power Lab.*, No. 02-4083(L) etc. (CA2), p. 12, available at http://www.eeoc.gov/briefs/meacha.txt (all Internet materials as visited Mar. 24, 2005, and available in Clerk of Court's case file) ("The Commission has consistently defended [the interpretation announced in 29 CFR § 1625.7(d) (2004)], arguing that a claim of discrimination under a disparate impact theory is cognizable"); Brief for EEOC as *Amicus Curiae* Supporting Plaintiffs-Appellants Seeking Reversal in *Sitko* v. *Goodyear Tire & Rubber Co.*, No. 02-4083 (CA6), p. 8, available at http://www.eeoc.gov/briefs/sitkov.txt (pending); *EEOC* v. *McDonnell Douglas Corp.*, 191 F. 3d 948, 950-951 (CA8 1999).

U. S. 218 (2001), the EEOC's reasonable view that the ADEA authorizes disparate-impact claims is deserving of deference. *Id.*, at 229–231, and n. 12. *A fortiori*, it is entitled to deference under the pre-*Mead* formulation of *Chevron*, to which I continue to adhere. See 533 U. S., at 256–257 (SCALIA, J., dissenting).

JUSTICE O'CONNOR both denies that the EEOC has taken a position on the existence of disparate-impact claims and asserts that, even if it has, its position does not deserve deference. See *post*, at 264–267 (opinion concurring in judgment). The first claim cannot be squared with the text of the EEOC's regulation, quoted above. This cannot possibly be read as agnostic on the question whether the ADEA prohibits employer practices that have a disparate impact on the aged. It provides that such practices "can *only* be justified as a business necessity," compelling the conclusion that, absent a "business necessity," such practices are prohibited.[2]

JUSTICE O'CONNOR would not defer to the EEOC regulation, even if it read as it does, because, she says, the regulation "does not purport to interpret the language of § 4(a) at all," but is rather limited to an interpretation of the "reasonable factors other than age" (RFOA) clause of § 4(f)(1) of the ADEA, which she says is not at issue. *Post*, at 265. This argument assumes, however, that the RFOA clause operates independently of the remainder of the ADEA. It does not. Section 4(f)(1) provides, in relevant part:

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[2] Perhaps JUSTICE O'CONNOR adopts the narrower position that, while the EEOC has taken the view that the ADEA prohibits actions that have a disparate impact, it has stopped short of recognizing "disparate impact *claims*." *Post*, at 265 (opinion concurring in judgment) (emphasis added). If so, this position is equally misguided. The EEOC need not take the extra step of recognizing that individuals harmed by prohibited actions have a right to sue; the ADEA itself makes that automatic. 29 U. S. C. § 626(c)(1) ("Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter . . . ").

> "It shall not be unlawful for an employer, employment agency, or labor organization . . . to take any action *otherwise prohibited* under subsections (a), (b), (c), or (e) of this section . . . where the differentiation is based on reasonable factors other than age . . . ." 29 U. S. C. § 623(f)(1) (emphasis added).

As this text makes clear, the RFOA defense is relevant *only* as a response to employer actions "otherwise prohibited" by the ADEA. Hence, the unavoidable meaning of the regulation at issue is that the ADEA prohibits employer actions that have an "adverse impact on individuals within the protected age group." 29 CFR § 1625.7(d) (2004). And, of course, the only provision of the ADEA that could conceivably be interpreted to effect such a prohibition is § 4(a)(2)—the provision that JUSTICE O'CONNOR maintains the EEOC "does not purport to interpret . . . at all." *Post*, at 265.[3]

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[3] JUSTICE O'CONNOR argues that the regulation does not necessarily construe § 4(a)(2) to prohibit disparate impact, because disparate treatment *also* can have the effect which the regulation addresses—viz., "an adverse impact on individuals within the protected age group," 29 CFR § 1625.7(d) (2004). See *post*, at 265–266. That is true enough. But the question here is not whether disparate-treatment claims (when they have a disparate impact) are *also* covered by the regulation; it is whether disparate-impact claims of *all* sorts *are* covered; and there is no way to avoid the conclusion (consistently reaffirmed by the agency's actions over the years) that they are. That is also a complete response to JUSTICE O'CONNOR's point that the regulation could not refer to § 4(a)(2) because it includes "applicants for employment," who are protected only under § 4(a)(1). Perhaps applicants for employment are covered only when (as JUSTICE O'CONNOR posits) disparate treatment results in disparate impact; or perhaps the agency's attempt to sweep employment applications into the disparate-impact prohibition is mistaken. But whatever *in addition* it may cover, or may erroneously seek to cover, it is impossible to contend that the regulation does *not* cover actions that "limit, segregate, or classify" employees in a way that produces a disparate impact on those within the protected age group; and the only basis for its interpretation that those actions are prohibited is § 4(a)(2).

Lastly, JUSTICE O'CONNOR argues that the EEOC's interpretation of what is "otherwise prohibited" by the ADEA is not entitled to deference because the Court concludes that the same regulation's interpretation of *another term*—the term "reasonable factors other than age," which the regulation takes to include only "business necessity"—is unreasonable. *Post*, at 266. Her logic seems to be that, because the two interpretations appear in the same paragraph, they should stand or fall together. She cites no case for this proposition, and it makes little sense. If the two simultaneously adopted interpretations were contained in *distinct* paragraphs, the invalidation of one would not, of course, render the other infirm. (JUSTICE O'CONNOR does not mean to imply, I assume, that our rejection of the EEOC's application of the phrase "'reasonable factors other than age'" to disparate-impact claims in paragraph (d) of § 1625.7 relieves the lower courts of the obligation to defer to the EEOC's other applications of the same phrase in paragraph (c) or (e).) I can conceive no basis for a different rule simply because the two simultaneously adopted interpretations appear in the same paragraph.

The EEOC has express authority to promulgate rules and regulations interpreting the ADEA. It has exercised that authority to recognize disparate-impact claims. And, for the reasons given by the plurality opinion, its position is eminently reasonable. In my view, that is sufficient to resolve this case.

JUSTICE O'CONNOR, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in the judgment.

"Disparate treatment . . . captures the essence of what Congress sought to prohibit in the [Age Discrimination in Employment Act of 1967 (ADEA), 29 U. S. C. § 621 *et seq.*] It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age." *Hazen Paper*

*Co.* v. *Biggins*, 507 U. S. 604, 610 (1993). In the nearly four decades since the ADEA's enactment, however, we have never read the statute to impose liability upon an employer without proof of discriminatory intent. See *ibid.*; *Markham* v. *Geller*, 451 U. S. 945 (1981) (REHNQUIST, J., dissenting from denial of certiorari). I decline to join the Court in doing so today.

I would instead affirm the judgment below on the ground that disparate impact claims are not cognizable under the ADEA. The ADEA's text, legislative history, and purposes together make clear that Congress did not intend the statute to authorize such claims. Moreover, the significant differences between the ADEA and Title VII of the Civil Rights Act of 1964 counsel against transposing to the former our construction of the latter in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). Finally, the agencies charged with administering the ADEA have never authoritatively construed the statute's prohibitory language to impose disparate impact liability. Thus, on the precise question of statutory interpretation now before us, there is no reasoned agency reading of the text to which we might defer.

## I

### A

Our starting point is the statute's text. Section 4(a) of the ADEA makes it unlawful for an employer:

> "(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or]
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age . . . ." 29 U. S. C. § 623(a).

Neither petitioners nor the plurality contend that the first paragraph, § 4(a)(1), authorizes disparate impact claims, and I think it obvious that it does not. That provision plainly requires discriminatory intent, for to take an action against an individual "*because of* such individual's age" is to do so "by reason of" or "on account of" her age. See Webster's Third New International Dictionary 194 (1961); see also *Teamsters* v. *United States*, 431 U. S. 324, 335–336, n. 15 (1977) ("'Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others *because of* their [protected characteristic]. Proof of discriminatory motive is critical" (emphasis added)).

Petitioners look instead to the second paragraph, § 4(a)(2), as the basis for their disparate impact claim. But petitioners' argument founders on the plain language of the statute, the natural reading of which requires proof of discriminatory intent. Section 4(a)(2) uses the phrase "because of . . . age" in precisely the same manner as does the preceding paragraph—to make plain that an employer is liable only if its adverse action against an individual is *motivated by* the individual's age.

Paragraphs (a)(1) and (a)(2) do differ in one informative respect. The employer actions targeted by paragraph (a)(1)—*i. e.*, refusing to hire, discharging, or discriminating against—are *inherently harmful* to the targeted individual. The actions referred to in paragraph (a)(2), on the other hand—*i. e.*, limiting, segregating, or classifying—are *facially neutral*. Accordingly, paragraph (a)(2) includes additional language which clarifies that, to give rise to liability, the employer's action must actually injure someone: The decision to limit, segregate, or classify employees must "deprive or tend to deprive [an] individual of employment opportunities or otherwise adversely affect his status as an employee." That distinction aside, the structures of paragraphs (a)(1) and (a)(2) are otherwise identical. Each paragraph prohibits an

employer from taking specified adverse actions against an individual "because of such individual's age."

The plurality instead reads paragraph (a)(2) to prohibit employer actions that "adversely affect [an individual's] status as an employe[e] because of such individual's age." Under this reading, "because of . . . age" refers to the *cause of the adverse effect* rather than the *motive for the employer's action*. See *ante*, at 235–236. This reading is unpersuasive for two reasons. First, it ignores the obvious parallel between paragraphs (a)(1) and (a)(2) by giving the phrase "because of such individual's age" a different meaning in each of the two paragraphs. And second, it ignores the drafters' use of a comma separating the "because of . . . age" clause from the preceding language. That comma makes plain that the "because of . . . age" clause should not be read, as the plurality would have it, to modify only the "adversely affect" phrase. See, *e. g.*, *United States* v. *Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241 (1989) (interpreting statute in light of the drafters' use of a comma to set aside a particular phrase from the following language); see also B. Garner, A Dictionary of Modern Legal Usage 101 (2d ed. 1995) ("Generally, the word *because* should not follow a comma"). Rather, the "because of . . . age" clause is set aside to make clear that it modifies the *entirety* of the preceding paragraph: An employer may not, because of an individual's age, limit, segregate, or classify his employees in a way that harms that individual.

The plurality also argues that its reading is supported by the supposed "incongruity" between paragraph (a)(2)'s use of the plural in referring to the employer's actions ("limit, segregate, or classify his *employees*") and its use of the singular in the "because of such *individual's* age" clause. (Emphases added.) *Ante*, at 236, n. 6. Not so. For the reasons just stated, the "because of . . . age" clause modifies *all* of the preceding language of paragraph (a)(2). That preceding language is phrased in *both* the plural (insofar as it

refers to the employer's actions relating to *employees*) *and* the singular (insofar as it requires that such action actually harm *an individual*). The use of the singular in the "because of . . . age" clause simply makes clear that paragraph (a)(2) forbids an employer to limit, segregate, or classify his employees if that decision is taken because of *even one* employee's age and *that individual* (alone or together with others) is harmed.

B

While § 4(a)(2) of the ADEA makes it unlawful to intentionally discriminate because of age, § 4(f)(1) clarifies that "[i]t shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section . . . where the differentiation is based on reasonable factors other than age . . . ." 29 U. S. C. § 623(f)(1). This "reasonable factors other than age" (RFOA) provision "insure[s] that employers [are] permitted to use neutral criteria" other than age, *EEOC* v. *Wyoming*, 460 U. S. 226, 232–233 (1983), even if this results in a disparate adverse impact on older workers. The provision therefore expresses Congress' clear intention that employers *not* be subject to liability absent proof of intentional age-based discrimination. That policy, in my view, cannot easily be reconciled with the plurality's expansive reading of § 4(a)(2).

The plurality, however, reasons that the RFOA provision's language instead confirms that § 4(a) authorizes disparate impact claims. If § 4(a) prohibited only intentional discrimination, the argument goes, then the RFOA provision would have no effect because any action based on a factor other than age would not be "'otherwise prohibited'" under § 4(a). See *ante*, at 238–239. Moreover, the plurality says, the RFOA provision applies only to employer actions based on *reasonable* factors other than age—so employers may still be held liable for actions based on *un*reasonable nonage factors. See *ante*, at 239.

This argument misconstrues the purpose and effect of the RFOA provision. Discriminatory intent *is* required under § 4(a), for the reasons discussed above. The role of the RFOA provision is to afford employers an independent *safe harbor* from liability. It provides that, where a plaintiff has made out a prima facie case of intentional age discrimination under § 4(a)—thus "creat[ing] a presumption that the employer unlawfully discriminated against the employee," *Texas Dept. of Community Affairs* v. *Burdine*, 450 U. S. 248, 254 (1981)—the employer can rebut this case by producing evidence that its action was based on a reasonable nonage factor. Thus, the RFOA provision codifies a safe harbor analogous to the "legitimate, nondiscriminatory reason" (LNR) justification later recognized in Title VII suits. *Ibid.*; *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 802 (1973).

Assuming the *McDonnell Douglas* framework applies to ADEA suits, see *O'Connor* v. *Consolidated Coin Caterers Corp.*, 517 U. S. 308, 311 (1996), this "rebuttal" function of the RFOA provision is arguably redundant with the judicially established LNR justification. See *ante*, at 238–239. But, at most, that merely demonstrates Congress' abundance of caution in codifying an *express statutory exemption* from liability in the absence of discriminatory intent. See *Fort Stewart Schools* v. *FLRA*, 495 U. S. 641, 646 (1990) (provisions that, although "technically unnecessary," are sometimes "inserted out of an abundance of caution—a drafting imprecision venerable enough to have left its mark on legal Latin *(ex abundanti cautela)*"). It is noteworthy that even after *McDonnell Douglas* was decided, lower courts continued to rely on the RFOA exemption, in lieu of the LNR justification, as the basis for rebutting a prima facie case of age discrimination. See, *e. g.*, *Krieg* v. *Paul Revere Life Ins. Co.*, 718 F. 2d 998, 999 (CA11 1983) *(per curiam)*; *Schwager* v. *Sun Oil Co. of Pa.*, 591 F. 2d 58, 61 (CA10 1979); *Bittar* v. *Air Canada*, 512 F. 2d 582, 582–583 (CA5 1975) *(per curiam)*.

In any event, the RFOA provision also plays a distinct (and clearly nonredundant) role in "mixed-motive" cases. In such cases, an adverse action taken in substantial part because of an employee's age may be "otherwise prohibited" by § 4(a). See *Desert Palace, Inc.* v. *Costa*, 539 U. S. 90, 93 (2003); *Price Waterhouse* v. *Hopkins*, 490 U. S. 228, 262–266 (1989) (O'CONNOR, J., concurring in judgment). The RFOA exemption makes clear that such conduct is nevertheless lawful so long as it is "based on" a reasonable factor other than age.

Finally, the RFOA provision's reference to "reasonable" factors serves only to prevent the employer from gaining the benefit of the statutory safe harbor by offering an irrational justification. Reliance on an unreasonable nonage factor would indicate that the employer's explanation is, in fact, no more than a pretext for *intentional* discrimination. See *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U. S. 133, 147 (2000); see also *Hazen Paper*, 507 U. S., at 613–614.

## II

The legislative history of the ADEA confirms what its text plainly indicates—that Congress never intended the statute to authorize disparate impact claims. The drafters of the ADEA and the Congress that enacted it understood that age discrimination was qualitatively different from the kinds of discrimination addressed by Title VII, and that many legitimate employment practices would have a disparate impact on older workers. Accordingly, Congress determined that the disparate impact problem would best be addressed through noncoercive measures, and that the ADEA's prohibitory provisions should be reserved for combating intentional age-based discrimination.

### A

Although Congress rejected proposals to address age discrimination in the Civil Rights Act of 1964, § 715 of that Act directed the Secretary of Labor to undertake a study of age

discrimination in employment and to submit to Congress a report containing "such recommendations for legislation to prevent arbitrary discrimination in employment because of age as he determines advisable," 78 Stat. 265. See *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U. S. 581, 586–587 (2004); *EEOC* v. *Wyoming*, 460 U. S., at 229. In response, Secretary Willard Wirtz submitted the report that provided the blueprint for the ADEA. See Report of the Secretary of Labor, The Older American Worker: Age Discrimination in Employment (June 1965), reprinted in U. S. Equal Employment Opportunity Commission, Legislative History of the Age Discrimination in Employment Act (1981), Doc. No. 5 (hereinafter Wirtz Report or Report). Because the ADEA was modeled on the Wirtz Report's findings and recommendations, the Report provides critical insights into the statute's meaning. See generally Blumrosen, Interpreting the ADEA: Intent or Impact 14–20, in Age Discrimination in Employment Act: A Compliance and Litigation Manual for Lawyers and Personnel Practitioners 83–89 (M. Lake ed. 1982); see also *General Dynamics*, *supra*, at 587–590 (relying on the Wirtz Report to interpret the ADEA); *EEOC* v. *Wyoming*, *supra*, at 230–231 (discussing the Report's role in the drafting of the ADEA).

The Wirtz Report reached two conclusions of central relevance to the question presented by this case. First, the Report emphasized that age discrimination is qualitatively different from the types of discrimination prohibited by Title VII of the Civil Rights Act of 1964 (*i. e.*, race, color, religion, sex, and national origin discrimination). Most importantly—in stark contrast to the types of discrimination addressed by Title VII—the Report found no evidence that age discrimination resulted from intolerance or animus toward older workers. Rather, age discrimination was based primarily upon unfounded assumptions about the relationship between an individual's age and her ability to perform a job. Wirtz Report 2. In addition, whereas ability is nearly al-

ways completely unrelated to the characteristics protected by Title VII, the Report found that, in some cases, "there is in fact a relationship between [an individual's] age and his ability to perform the job." *Ibid.* (emphasis deleted).

Second, the Wirtz Report drew a sharp distinction between "'arbitrary discrimination'" (which the Report clearly equates with disparate treatment) and circumstances or practices having a disparate impact on older workers. See *id.*, at 2, 21–22. The Report defined "arbitrary" discrimination as adverse treatment of older workers "because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions.*" *Id.*, at 2 (emphasis in original). While the "most obvious kind" of arbitrary discrimination is the setting of unjustified maximum age limits for employment, *id.*, at 6, naturally the Report's definition encompasses a broad range of disparate treatment.

The Report distinguished such "arbitrary" (*i. e.*, intentional and unfounded) discrimination from two other phenomena. One involves differentiation of employees based on a genuine relationship between age and ability to perform a job. See *id.*, at 2. In this connection, the Report examined "circumstances which unquestionably affect older workers more strongly, as a group, than they do younger workers," including questions of health, educational attainment, and technological change. *Id.*, at 11–14.[1] In addition, the Re-

[1] It is in this connection that the Report refers to formal employment standards requiring a high school diploma. See Wirtz Report 3. The Wirtz Report did say that such a requirement would be "unfair" if an older worker's years of experience had given him an equivalent education. *Ibid.* But the plurality is mistaken to find in this statement a congressional "goal" of eliminating job requirements with a disparate impact on older workers. See *ante*, at 235, n. 5. Rather, the Wirtz Report discussed the diploma requirement in the context of a broader discussion of the effects of "wholly impersonal forces—most of them part of what is properly, if sometimes too casually, called 'progress.'" Wirtz Report 3. These forces included "the pace of changing technology, changing jobs,

port assessed "institutional arrangements"—such as seniority rules, workers' compensation laws, and pension plans—which, though intended to benefit older workers, might actually make employers less likely to hire or retain them. *Id.*, at 2, 15–17.

The Report specifically recommended legislative action to prohibit "arbitrary discrimination," *i. e.*, disparate treatment. *Id.*, at 21–22. In sharp contrast, it recommended that the other two types of "discrimination"—both involving factors or practices having a disparate impact on older workers—be addressed through noncoercive measures: programs to increase the availability of employment; continuing education; and adjustment of pension systems, workers' compensation, and other institutional arrangements. *Id.*, at 22–25. These recommendations found direct expression in the ADEA, which was drafted at Congress' command that the Secretary of Labor make "specific legislative recommendations for implementing the [Wirtz Report's] conclusions," Fair Labor Standards Amendments of 1966, § 606, 80 Stat. 845. See also *General Dynamics*, *supra*, at 589 ("[T]he ADEA . . . begins with statements of purpose and findings that mirror the Wirtz Report").

B

The ADEA's structure confirms Congress' determination to prohibit only "arbitrary" discrimination (*i. e.*, disparate treatment based on unfounded assumptions), while addressing practices with a disparate adverse impact on older work-

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*changing educational* requirements, and changing personnel practices," which "increase[d] the need for special efforts if older workers' employment prospects are to improve significantly." *Ibid.* (emphasis added); see also *id.*, at 11–15 (discussing the educational attainments of older workers, together with health and technological change, in a section entitled "The Necessary Recognition of Forces of Circumstance"). The Report recommended that such forces be addressed through noncoercive instead of prohibitory measures, and it specifically focused on the need for educational opportunities for older workers. See *id.*, at 23–25.

ers through noncoercive measures. Section 2—which sets forth the findings and purposes of the statute—draws a clear distinction between "the setting of arbitrary age limits regardless of potential for job performance" and "certain otherwise desirable practices [that] may work to the disadvantage of older persons." 29 U. S. C. § 621(a)(2). In response to these problems, § 2 identifies three purposes of the ADEA: "[1] to promote employment of older persons based on their ability rather than age; [2] to prohibit arbitrary age discrimination in employment; [and 3] to help employers and workers find ways of meeting problems arising from the impact of age on employment." § 621(b).

Each of these three purposes corresponds to one of the three substantive statutory sections that follow. Section 3 seeks to "promote employment of older persons" by directing the Secretary of Labor to undertake a program of research and education related to "the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy." § 622(a). Section 4, which contains the ADEA's core prohibitions, corresponds to the second purpose: to "prohibit arbitrary age discrimination in employment." Finally, § 5 addresses the third statutory purpose by requiring the Secretary of Labor to undertake a study of "institutional and other arrangements giving rise to involuntary retirement" and to submit any resulting findings and legislative recommendations to Congress. § 624(a)(1).

Section 4—including § 4(a)(2)—must be read in light of the express statutory purpose the provision was intended to effect: the prohibition of "arbitrary age discrimination in employment." § 621(b). As the legislative history makes plain, "arbitrary" age discrimination had a very specific meaning for the ADEA's drafters. It meant disparate *treatment* of older workers, predominantly because of unfounded assumptions about the relationship between age and ability. See *supra*, at 255–256. Again, such intentional discrimination was clearly distinguished from circumstances and prac-

tices merely having a disparate impact on older workers, which—as ADEA §§2, 3, and 5 make clear—Congress intended to address through research, education, and possible future legislative action.

C

In addition to this affirmative evidence of congressional intent, I find it telling that the legislative history is devoid of any discussion of disparate impact claims or of the complicated issues such claims raise in the ADEA context. See Gold, Disparate Impact Under the Age Discrimination in Employment Act of 1967, 25 Berkeley J. Emp. & Lab. L. 1, 40 (2004). At the time the ADEA was enacted, the predominant focus of antidiscrimination law was on intentional discrimination; the concept of disparate impact liability, by contrast, was quite novel. See, *e. g.*, Gold, *Griggs'* Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform, 7 Indus. Rel. L. J. 429, 518–520 (1985); Blumrosen, Strangers in Paradise: *Griggs v. Duke Power Co.* and the Concept of Employment Discrimination, 71 Mich. L. Rev. 59, 69–71 (1972–1973). Had Congress intended to inaugurate disparate impact liability in the ADEA, one would expect to find some indication of that intent in the text and the legislative history. There is none.

D

Congress' decision not to authorize disparate impact claims is understandable in light of the questionable utility of such claims in the age-discrimination context. No one would argue that older workers have suffered disadvantages as a result of entrenched historical patterns of discrimination, like racial minorities have. See *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U. S. 307, 313–314 (1976) *(per curiam);* see also Wirtz Report 5–6. Accordingly, disparate impact liability under the ADEA cannot be justified, and is not necessary, as a means of redressing the cumulative re-

sults of past discrimination. Cf. *Griggs*, 401 U. S., at 430 (reasoning that disparate impact liability is necessary under Title VII to prevent perpetuation of the results of past racial discrimination).

Moreover, the Wirtz Report correctly concluded that—unlike the classifications protected by Title VII—there often *is* a correlation between an individual's age and her ability to perform a job. Wirtz Report 2, 11–15. That is to be expected, for "physical ability generally declines with age," *Murgia*, *supra*, at 315, and in some cases, so does mental capacity, see *Gregory* v. *Ashcroft*, 501 U. S. 452, 472 (1991). Perhaps more importantly, advances in technology and increasing access to formal education often leave older workers at a competitive disadvantage vis-à-vis younger workers. Wirtz Report 11–15. Beyond these performance-affecting factors, there is also the fact that many employment benefits, such as salary, vacation time, and so forth, increase as an employee gains experience and seniority. See, *e. g.*, *Finnegan* v. *Trans World Airlines, Inc.*, 967 F. 2d 1161, 1164 (CA7 1992) ("[V]irtually all elements of a standard compensation package are positively correlated with age"). Accordingly, many employer decisions that are intended to cut costs or respond to market forces will likely have a disproportionate effect on older workers. Given the myriad ways in which legitimate business practices can have a disparate impact on older workers, it is hardly surprising that Congress declined to subject employers to civil liability based solely on such effects.

## III

The plurality and JUSTICE SCALIA offer two principal arguments in favor of their reading of the statute: that the relevant provision of the ADEA should be read *in pari materia* with the parallel provision of Title VII, and that we should give interpretive weight or deference to agency statements relating to disparate impact liability. I find neither argument persuasive.

A

The language of the ADEA's prohibitory provisions was modeled on, and is nearly identical to, parallel provisions in Title VII. See *McKennon* v. *Nashville Banner Publishing Co.*, 513 U. S. 352, 357 (1995); *Lorillard* v. *Pons*, 434 U. S. 575, 584 (1978). Because *Griggs*, *supra*, held that Title VII's § 703(a)(2) permits disparate impact claims, the plurality concludes that we should read § 4(a)(2) of the ADEA similarly. *Ante*, at 233–238.

Obviously, this argument would be a great deal more convincing had *Griggs* been decided *before* the ADEA was enacted. In that case, we could safely assume that Congress had notice (and therefore intended) that the language at issue here would be read to authorize disparate impact claims. See, *e. g.*, *Department of Energy* v. *Ohio*, 503 U. S. 607, 626 (1992); *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 268 (1992). But *Griggs* was decided four years *after* the ADEA's enactment, and there is no reason to suppose that Congress in 1967 could have foreseen the interpretation of Title VII that was to come. See *Fogerty* v. *Fantasy, Inc.*, 510 U. S. 517, 523, n. 9 (1994); see also *supra*, at 258 (discussing novelty of disparate impact theory at the time of the ADEA's enactment).

To be sure, where two statutes use similar language we generally take this as "a strong indication that [they] should be interpreted *pari passu*." *Northcross* v. *Board of Ed. of Memphis City Schools*, 412 U. S. 427, 428 (1973) *(per curiam)*. But this is not a rigid or absolute rule, and it "'readily yields'" to other indicia of congressional intent. *General Dynamics*, 540 U. S., at 595 (quoting *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 433 (1932)). Indeed, "'the meaning [of the same words] well may vary to meet the purposes of the law.'" *United States* v. *Cleveland Indians Baseball Co.*, 532 U. S. 200, 213 (2001) (quoting *Atlantic Cleaners & Dyers*, *supra*, at 433; alteration in original). Accordingly, we have not hesitated to give

a different reading to the same language—whether appearing in separate statutes or in separate provisions of the same statute—if there is strong evidence that Congress did not intend the language to be used uniformly. See, *e. g.*, *General Dynamics*, *supra*, at 595–597 ("age" has different meaning where used in different parts of the ADEA); *Cleveland Indians*, *supra*, at 213 ("wages paid" has different meanings in different provisions of Title 26 U. S. C.); *Robinson* v. *Shell Oil Co.*, 519 U. S. 337, 343–344 (1997) ("employee" has different meanings in different parts of Title VII); *Fogerty*, *supra*, at 522–525 (Copyright Act's attorney's fees provision has different meaning than the analogous provision in Title VII, despite their "virtually identical language"). Such is the case here.

First, there are significant textual differences between Title VII and the ADEA that indicate differences in congressional intent. Most importantly, whereas the ADEA's RFOA provision protects employers from liability for any actions not motivated by age, see *supra*, at 251–253, Title VII lacks any similar provision. In addition, the ADEA's structure demonstrates Congress' intent to combat intentional discrimination through §4's prohibitions while addressing employment practices having a disparate impact on older workers through independent noncoercive mechanisms. See *supra*, at 256–258. There is no analogy in the structure of Title VII. Furthermore, as the Congresses that adopted *both* Title VII *and* the ADEA clearly recognized, the two statutes were intended to address qualitatively different kinds of discrimination. See *supra*, at 253–255. Disparate impact liability may have a legitimate role in combating the types of discrimination addressed by Title VII, but the nature of aging and of age discrimination makes such liability inappropriate for the ADEA. See *supra*, at 258–259.

Finally, nothing in the Court's decision in *Griggs* itself provides any reason to extend its holding to the ADEA. As the plurality tacitly acknowledges, *ante*, at 235, the decision

in *Griggs* was not based on any analysis of Title VII's actual language. Rather, the *ratio decidendi* was the statute's perceived *purpose, i. e.*,

> "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." 401 U. S., at 429–430.

In other words, the Court in *Griggs* reasoned that disparate impact liability was necessary to achieve Title VII's ostensible goal of eliminating the cumulative effects of historical racial discrimination. However, that rationale finds no parallel in the ADEA context, see *Murgia*, 427 U. S., at 313–314, and it therefore should not control our decision here.

Even venerable canons of construction must bow, in an appropriate case, to compelling evidence of congressional intent. In my judgment, the significant differences between Title VII and the ADEA are more than sufficient to overcome the default presumption that similar language is to be read similarly. See *Fogerty, supra*, at 523–524 (concluding that the "normal indication" that similar language should be read similarly is "overborne" by differences between the legislative history and purposes of two statutes).

B

The plurality asserts that the agencies charged with the ADEA's administration "have consistently interpreted the [statute] to authorize relief on a disparate-impact theory." *Ante*, at 239. In support of this claim, the plurality describes a 1968 interpretive bulletin issued by the Department of Labor as "permitt[ing]" disparate impact claims. *Ibid.* (citing 29 CFR § 860.103(f)(1)(i) (1970)). And the plu-

rality cites, without comment, an Equal Employment Opportunity Commission (EEOC) policy statement construing the RFOA provision. *Ante*, at 240 (citing 29 CFR §1625.7 (2004)). It is unclear what interpretive value the plurality means to assign to these agency statements. But JUSTICE SCALIA, at least, thinks that the EEOC statement is entitled to deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), and that "that is sufficient to resolve this case." *Ante*, at 247 (opinion concurring in part and concurring in judgment). I disagree and, for the reasons that follow, would give no weight to the statements in question.

The 1968 Labor Department bulletin to which the plurality alludes was intended to "provide 'a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it.'" 29 CFR §860.1 (1970) (quoting *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 138 (1944)). In discussing the RFOA provision, the bulletin states that "physical fitness requirements" and "[e]valuation factors such as quantity or quality of production, or educational level" can qualify as reasonable nonage factors, so long as they have a valid relationship to job qualifications and are uniformly applied. §§860.103(f)(1), (2). But the bulletin does not construe the ADEA's *prohibitory* provisions, nor does it state or imply that §4(a) authorizes disparate impact claims. Rather, it establishes "a nonexclusive objective test for employers to use in determining whether they could be certain of qualifying for the" RFOA exemption. *Public Employees Retirement System of Ohio* v. *Betts*, 492 U. S. 158, 172 (1989) (discussing 1968 bulletin's interpretation of the §4(f)(2) exemption). Moreover, the very same bulletin states unequivocally that "[t]he clear purpose [of the ADEA] is to insure that age, within the limits prescribed by the Act, is not *a determining factor in making any decision* regarding the hiring, dismissal, promotion or any other term, condition or privilege of employment of an

individual." § 860.103(c) (emphasis added). That language is all about discriminatory intent.

The EEOC statement cited by the plurality and relied upon by JUSTICE SCALIA is equally unhelpful. This "interpretative rule or policy statement," promulgated in 1981, superseded the 1968 Labor Department bulletin after responsibility for enforcing the ADEA was transferred from Labor to the EEOC. See 46 Fed. Reg. 47724 (1981). It states, in relevant part:

> "[W]hen an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity." 29 CFR § 1625.7(d) (2004).

Like the 1968 bulletin it replaces, this statement merely spells out the agency's view, for purposes of its enforcement policy, of what an employer must do to be certain of gaining the safety of the RFOA haven. It says nothing about whether disparate impact claims are authorized by the ADEA.

For JUSTICE SCALIA, "[t]his is an absolutely classic case for deference to agency interpretation." *Ante*, at 243 (opinion concurring in part and concurring in judgment). I disagree. Under *Chevron*, we will defer to a reasonable agency interpretation of ambiguous statutory language, see 467 U. S., at 843–844, provided that the interpretation has the requisite "force of law," *Christensen* v. *Harris County*, 529 U. S. 576, 587 (2000). The rationale for such deference is that Congress has explicitly or implicitly delegated to the agency responsible for administering a statute the authority to choose among permissible constructions of ambiguous statutory text. See *Chevron*, *supra*, at 844. The question now before us is not what it takes to qualify for the RFOA exemption,

but rather whether § 4(a)(2) of the ADEA authorizes disparate impact claims. But the EEOC statement does not purport to interpret the language of § 4(a) at all. Quite simply, the agency has not actually exercised its delegated authority to resolve any ambiguity in the relevant provision's text, much less done so in a reasonable or persuasive manner. As to the specific question presented, therefore, the regulation is not entitled to any deference. See *John Hancock Mut. Life Ins. Co.* v. *Harris Trust and Sav. Bank*, 510 U. S. 86, 106–109, and n. 17 (1993); see also *SEC* v. *Sloan*, 436 U. S. 103, 117–118 (1978); *Adamo Wrecking Co.* v. *United States*, 434 U. S. 275, 287–289, and n. 5 (1978).[2]

JUSTICE SCALIA's attempt to link the EEOC's RFOA regulation to § 4(a)(2) is premised on a dubious chain of inferences that, in my view, highlights the hazards of his approach. Because the RFOA provision is "relevant *only* as a response to employer actions 'otherwise prohibited' by the ADEA," he reasons, the "unavoidable meaning" of the EEOC statement is that the agency interprets the ADEA to prohibit "employer actions that have an 'adverse impact on individuals within the protected age group.'" *Ante*, at 246 (opinion concurring in part and concurring in judgment) (quoting 29 CFR § 1625.7(d) (2004)). But, of course, *disparate treatment* clearly has an "adverse impact on individuals within the protected age group," *ibid.*, and JUSTICE SCALIA's reading of the EEOC's rule is hardly "unavoidable." The regulation says only that if an employer wants to rely on a practice—say, a physical fitness test—as the basis for an exemption from liability, and that test adversely affects older workers, the employer can be sure of qualifying for the exemption only if the test is sufficiently job related. Such a

[2] Because the EEOC regulation does not actually interpret the text at issue, we need not address the degree of deference to which the regulation would otherwise be entitled. Cf. *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U. S. 581, 600 (2004) (declining to address whether EEOC's regulations interpreting the ADEA are entitled to *Chevron* deference).

limitation makes sense in disparate treatment cases. A test that harms older workers and is unrelated to the job may be a pretext for—or even a means of effectuating—intentional discrimination. See *supra*, at 253. JUSTICE SCALIA completes his analytical chain by inferring that the EEOC regulation *must* be read to interpret *§ 4(a)(2)* to allow disparate impact claims because that is the only provision of the ADEA that could "conceivably" be so interpreted. *Ante*, at 246. But the support for that inference is doubtful, to say the least. The regulation specifically refers to employment practices claimed as a basis for "different treatment of employees *or applicants for employment*," 29 CFR § 1625.7(d) (2004) (emphasis added). Section 4(a)(2), of course, does not apply to "applicants for employment" at all—it is only § 4(a)(1) that protects this group. See 29 U. S. C. § 623(a). That suggests that the EEOC must have read the RFOA to provide a defense against claims under § 4(a)(1)—which unquestionably permits only disparate treatment claims, see *supra*, at 249.

This discussion serves to illustrate why it makes little sense to attribute to the agency a construction of the relevant statutory text that the agency itself has not actually articulated so that we can then "defer" to that reading. Such an approach is particularly troubling where applied to a question as weighty as whether a statute does or does not subject employers to liability absent discriminatory intent. This is not, in my view, what *Chevron* contemplated.

As an interpretation of the *RFOA provision*, moreover, the EEOC regulation is both unreasonable on its face and directly at odds with the Court's holding in today's case. It says that the RFOA exemption is available only if the employer's practice is justified by a "business necessity." But the Court has rejected that reading of the RFOA provision, and rightly so: There may be many "reasonable" means by which an employer can advance its goals, and a given nonage factor can certainly be "reasonable" without being necessary.

*Ante*, at 243; see also *Western Air Lines, Inc.* v. *Criswell*, 472 U. S. 400, 419 (1985) (distinguishing "'reasonable necessity'" standard from "reasonableness"). Of course, it is elementary that "no deference is due to agency interpretations at odds with the plain language of the statute itself." *Betts*, 492 U. S., at 171. The agency clearly misread the RFOA provision it was attempting to construe. That error is not necessarily dispositive of the disparate impact question. But I think it highlights the improvidence of giving weight (let alone deferring) to the regulation's *purported assumption* that an *entirely different provision* of the statute, which is not even the subject of the regulation, authorizes disparate impact claims. In my view, we should simply acknowledge that this regulation is of no help in answering the question presented.

## IV

Although I would not read the ADEA to authorize disparate impact claims, I agree with the Court that, if such claims are allowed, they are strictly circumscribed by the RFOA exemption. See *ante*, at 241–242. That exemption requires only that the challenged employment practice be based on a "reasonable" nonage factor—that is, one that is rationally related to some legitimate business objective. I also agree with the Court, *ante*, at 240, that, if disparate impact claims are to be permitted under the ADEA, they are governed by the standards set forth in our decision in *Wards Cove Packing Co.* v. *Atonio*, 490 U. S. 642 (1989). That means, as the Court holds, *ante*, at 241, that "a plaintiff must demonstrate that it is the application of a *specific or particular employment practice* that has *created* the disparate impact under attack," *Wards Cove*, *supra*, at 657 (emphasis added); see also *Watson* v. *Fort Worth Bank & Trust*, 487 U. S. 977, 994 (1988) (opinion of O'CONNOR, J.). It also means that once the employer has produced evidence that its action was based on a reasonable nonage factor, the plaintiff bears the burden of disproving this assertion. See *Wards Cove*, *supra*, at 659–

660; see also *Watson*, *supra*, at 997 (opinion of O'CONNOR, J.). Even if petitioners' disparate impact claim were cognizable under the ADEA, that claim clearly would fail in light of these requirements.

Syllabus

# RHINES *v.* WEBER, WARDEN

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 03–9046. Argued January 12, 2005—Decided March 30, 2005

After petitioner Rhines' state conviction for first-degree murder and burglary became final and his state habeas petition was denied, he filed a federal habeas petition. Because the 1-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was tolled while his state petition was pending, see 28 U. S. C. § 2244(d)(2), he had more than 11 months before the limitations period expired. However, by the time the District Court ruled that eight of his claims had not been exhausted in state court, the limitations period had run. If the court had dismissed his "mixed" petition, Rhines would have been unable to refile after exhausting his claims, so the court decided to hold his federal petition in abeyance while he presented his unexhausted claims in state court, provided that he commenced the state proceedings within 60 days and returned to the District Court within 60 days of completing the exhaustion. The Eighth Circuit, which had previously held that a district court has no authority to hold mixed petitions in abeyance absent truly exceptional circumstances, vacated the stay and remanded the case for the District Court to determine whether Rhines could proceed by deleting unexhausted claims.

*Held:* A district court has discretion to stay a mixed petition to allow a petitioner to present his unexhausted claims to the state court in the first instance and then to return to federal court for review of his perfected petition. Pp. 273–279.

(a) Fourteen years before Congress enacted AEDPA, this Court held that federal district courts may not adjudicate mixed petitions but must give state courts the first opportunity to decide a petitioner's claims; imposed a "total exhaustion" requirement; and directed federal courts to effectuate that requirement by dismissing mixed petitions without prejudice and allowing petitioners to return to state court. *Rose* v. *Lundy*, 455 U. S. 509, 518–519. At the time, there was no statute of limitations on federal habeas petitions. But that changed with AEDPA, which preserved *Lundy*'s total exhaustion requirement while imposing a 1-year limitations period, which is tolled during the pendency of a state, but not a federal, habeas petition. As a result, petitioners such as Rhines run the risk of forever losing their opportunity for federal review of their unexhausted claims. Even a petitioner who files

early cannot control when a district court will resolve the exhaustion question. The gravity and difficulty of this problem has led some district courts to adopt the "stay-and-abeyance" procedure at issue. Pp. 273–276.

(b) AEDPA does not deprive district courts of the authority to issue stays that are a proper exercise of their discretion, but it does circumscribe that discretion. Any solution to this problem therefore must be compatible with AEDPA's purposes. Staying a federal habeas petition frustrates AEDPA's objective of encouraging finality of state court judgments by allowing a petitioner to delay the resolution of the federal proceedings, and it undermines AEDPA's goal of streamlining federal habeas proceedings by decreasing a petitioner's incentive to exhaust all his claims in state court before filing his federal petition. Thus, stay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims. Even if good cause existed, the district court would abuse its discretion if it granted a stay when the unexhausted claims are plainly meritless. Where stay and abeyance is appropriate, the district court's discretion is still limited by AEDPA's timeliness concerns. If a district court does not place reasonable time limits on a petitioner's trip to state court and back, petitioners, especially capital petitioners, could frustrate AEDPA's finality goal by dragging out indefinitely their federal habeas review. And if a petitioner engages in abusive litigation tactics or intentional delay, the district court should not grant a stay at all. On the other hand, it likely would be an abuse of discretion for a district court to deny a stay and dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that he engaged in intentionally dilatory litigation tactics. Such a petitioner's interest in obtaining federal review of his claims outweighs the competing interests in finality and speedy resolution of federal petitions. For the same reason, if the court determines that stay and abeyance is inappropriate, it should allow the petitioner to delete the unexhausted claims and proceed with the exhausted ones if dismissing the entire petition would unreasonably impair the petitioner's right to obtain federal relief. Pp. 276–279.

346 F. 3d 799, vacated and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, SCALIA, KENNEDY, THOMAS, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a concurring opinion, in which GINSBURG

and BREYER, JJ., joined, *post*, p. 279. SOUTER, J., filed an opinion concurring in part and concurring in the judgment, in which GINSBURG and BREYER, JJ., joined, *post*, p. 279.

*Roberto A. Lange*, by appointment of the Court, 543 U. S. 806, argued the cause and filed briefs for petitioner.

*Lawrence E. Long*, Attorney General of South Dakota, argued the cause for respondent. With him on the brief was *Craig M. Eichstadt*, Deputy Attorney General.*

JUSTICE O'CONNOR delivered the opinion of the Court.

We confront here the problem of a "mixed" petition for habeas corpus relief in which a state prisoner presents a federal court with a single petition containing some claims that have been exhausted in the state courts and some that have not. More precisely, we consider whether a federal district court has discretion to stay the mixed petition to allow the petitioner to present his unexhausted claims to the state

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*A brief of *amicus curiae* urging reversal was filed for the National Association of Criminal Defense Lawyers by *Pamela Harris* and *David M. Porter*.

A brief of *amici curiae* urging affirmance was filed for the State of California et al. by *Bill Lockyer*, Attorney General of California, *Manuel M. Medeiros*, State Solicitor General, *Robert R. Anderson*, Chief Assistant Attorney General, *Pamela C. Hamanaka*, Senior Assistant Attorney General, *Donald E. de Nicola* and *Paul M. Roadarmel, Jr.*, Deputy Attorneys General, and *Christopher L. Morano*, Chief State's Attorney of Connecticut, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Terry Goddard* of Arizona, *Mike Beebe* of Arkansas, *M. Jane Brady* of Delaware, *Thurbert E. Baker* of Georgia, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Steve Carter* of Indiana, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Jim Hood* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Jon Bruning* of Nebraska, *Brian Sandoval* of Nevada, *Kelly A. Ayotte* of New Hampshire, *Patricia A. Madrid* of New Mexico, *Eliot Spitzer* of New York, *Wayne Stenehjem* of North Dakota, *Jim Petro* of Ohio, *Gerald J. Pappert* of Pennsylvania, *Paul G. Summers* of Tennessee, *Mark L. Shurtleff* of Utah, *Jerry W. Kilgore* of Virginia, *Darrell V. McGraw, Jr.*, of West Virginia, and *Patrick J. Crank* of Wyoming.

court in the first instance, and then to return to federal court for review of his perfected petition.

## I

Petitioner Charles Russell Rhines was convicted in South Dakota state court of first-degree murder and third-degree burglary and sentenced to death. His conviction became final on December 2, 1996, when we denied his initial petition for certiorari. *Rhines* v. *South Dakota*, 519 U. S. 1013. On December 5, 1996, Rhines filed a petition for state habeas corpus. App. 32. The state court denied his petition, and the Supreme Court of South Dakota affirmed on February 9, 2000, *Rhines* v. *Weber*, 2000 SD 19, 608 N. W. 2d 303. Rhines filed his *pro se* petition for federal habeas corpus pursuant to 28 U. S. C. § 2254 in the United States District Court for the District of South Dakota on February 22, 2000. App. 3. Because the 1-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was tolled while Rhines' state habeas corpus petition was pending, see 28 U. S. C. § 2244(d)(2), he still had more than 11 months left before the expiration of the limitations period.

With the assistance of court-appointed counsel, Rhines filed an amended petition for writ of habeas corpus and statement of exhaustion on November 20, 2000, asserting 35 claims of constitutional defects in his conviction and sentence. App. 39–60. The State challenged 12 of those claims as unexhausted. *Id.*, at 72–79. On July 3, 2002, approximately 18 months after Rhines had filed his amended federal habeas corpus petition, the District Court held that 8 of the 35 claims had not been exhausted. At this time, the AEDPA 1-year statute of limitations had run. See *Duncan* v. *Walker*, 533 U. S. 167, 181–182 (2001) (holding that the statute of limitations is not tolled during the pendancy of a federal petition). As a result, if the District Court had dismissed Rhines' mixed petition at that point, he would

have been unable to refile in federal court after exhausting the unexhausted claims. Rhines therefore moved the District Court to hold his pending habeas petition in abeyance while he presented his unexhausted claims to the South Dakota courts. On July 3, 2002, the District Court granted the motion and issued a stay "conditioned upon petitioner commencing state court exhaustion proceedings within sixty days of this order and returning to this court within sixty days of completing such exhaustion." App. 136. In compliance with that order, Rhines filed his second state habeas corpus petition on August 22, 2002.

The State appealed the District Court's stay of Rhines' mixed petition to the United States Court of Appeals for the Eighth Circuit. Relying on its decision in *Akins* v. *Kenney*, 341 F. 3d 681, 686 (2003) (holding that "a district court has no authority to hold a habeas petition containing unexhausted claims in abeyance absent truly exceptional circumstances" (internal quotation marks omitted)), the Court of Appeals vacated the stay and remanded the case to the District Court to determine whether Rhines could proceed by deleting unexhausted claims from his petition. 346 F. 3d 799 (2003). We granted certiorari to resolve a split in the Circuits regarding the propriety of the District Court's "stay-and-abeyance" procedure. 542 U. S. 936 (2004). Compare, *e. g.*, *Crews* v. *Horn*, 360 F. 3d 146, 152 (CA3 2004); and *Zarvela* v. *Artuz*, 254 F. 3d 374, 381 (CA2 2001), with 346 F. 3d 799 (2003) (case below).

## II

Fourteen years before Congress enacted AEDPA, we held in *Rose* v. *Lundy*, 455 U. S. 509 (1982), that federal district courts may not adjudicate mixed petitions for habeas corpus, that is, petitions containing both exhausted and unexhausted claims. We reasoned that the interests of comity and federalism dictate that state courts must have the first opportunity to decide a petitioner's claims. *Id.*, at 518–519. We

noted that "[b]ecause 'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation,' federal courts apply the doctrine of comity." *Id.*, at 518 (quoting *Darr* v. *Burford*, 339 U. S. 200, 204 (1950)). That doctrine "'teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.'" 455 U. S., at 518.

Accordingly, we imposed a requirement of "total exhaustion" and directed federal courts to effectuate that requirement by dismissing mixed petitions without prejudice and allowing petitioners to return to state court to present the unexhausted claims to that court in the first instance. *Id.*, at 522. When we decided *Lundy*, there was no statute of limitations on the filing of federal habeas corpus petitions. As a result, petitioners who returned to state court to exhaust their previously unexhausted claims could come back to federal court to present their perfected petitions with relative ease. See *Slack* v. *McDaniel*, 529 U. S. 473, 486 (2000) (dismissal without prejudice under *Lundy* "contemplated that the prisoner could return to federal court after the requisite exhaustion").

The enactment of AEDPA in 1996 dramatically altered the landscape for federal habeas corpus petitions. AEDPA preserved *Lundy*'s total exhaustion requirement, see 28 U. S. C. §2254(b)(1)(A) ("An application for a writ of habeas corpus . . . shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State"), but it also imposed a 1-year statute of limitations on the filing of federal petitions, §2244(d). Although the limitations period is tolled during the pendency of a "properly filed application for State post-conviction or other collateral review," §2244(d)(2), the filing of a petition for ha-

beas corpus in federal court does not toll the statute of limitations, *Duncan*, 533 U. S., at 181–182.

As a result of the interplay between AEDPA's 1-year statute of limitations and *Lundy*'s dismissal requirement, petitioners who come to federal court with "mixed" petitions run the risk of forever losing their opportunity for any federal review of their unexhausted claims. If a petitioner files a timely but mixed petition in federal district court, and the district court dismisses it under *Lundy* after the limitations period has expired, this will likely mean the termination of any federal review. For example, if the District Court in this case had dismissed the petition because it contained unexhausted claims, AEDPA's 1-year statute of limitations would have barred Rhines from returning to federal court after exhausting the previously unexhausted claims in state court. Similarly, if a district court dismisses a mixed petition close to the end of the 1-year period, the petitioner's chances of exhausting his claims in state court and refiling his petition in federal court before the limitations period runs are slim. The problem is not limited to petitioners who file close to the AEDPA deadline. Even a petitioner who files early will have no way of controlling when the district court will resolve the question of exhaustion. Thus, whether a petitioner ever receives federal review of his claims may turn on which district court happens to hear his case.

We recognize the gravity of this problem and the difficulty it has posed for petitioners and federal district courts alike. In an attempt to solve the problem, some district courts have adopted a version of the "stay-and-abeyance" procedure employed by the District Court below. Under this procedure, rather than dismiss the mixed petition pursuant to *Lundy*, a district court might stay the petition and hold it in abeyance while the petitioner returns to state court to exhaust his previously unexhausted claims. Once the petitioner ex-

hausts his state remedies, the district court will lift the stay and allow the petitioner to proceed in federal court.

District courts do ordinarily have authority to issue stays, see *Landis* v. *North American Co.*, 299 U. S. 248, 254 (1936), where such a stay would be a proper exercise of discretion, see *Clinton* v. *Jones*, 520 U. S. 681, 706 (1997). AEDPA does not deprive district courts of that authority, cf. 28 U. S. C. § 2254(b)(1)(A) ("An application for a writ of habeas corpus . . . shall not be *granted* unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State" (emphasis added)), but it does circumscribe their discretion. Any solution to this problem must therefore be compatible with AEDPA's purposes.

One of the statute's purposes is to "reduce delays in the execution of state and federal criminal sentences, particularly in capital cases." *Woodford* v. *Garceau*, 538 U. S. 202, 206 (2003). See also *Duncan*, 533 U. S., at 179. AEDPA's 1-year limitations period "quite plainly serves the well-recognized interest in the finality of state court judgments." *Ibid.* It "reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Ibid.*

Moreover, Congress enacted AEDPA against the backdrop of *Lundy*'s total exhaustion requirement. The tolling provision in § 2244(d)(2) "balances the interests served by the exhaustion requirement and the limitation period" "by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued." *Duncan*, *supra*, at 179. AEDPA thus encourages petitioners to seek relief from state courts in the first instance by tolling the 1-year limitations period while a "properly filed application for State post-conviction or other collateral review" is pending. 28 U. S. C. § 2244(d)(2). This scheme reinforces the importance of *Lundy*'s "simple and clear instruction to potential litigants: before you bring any claims to federal court,

be sure that you first have taken each one to state court." 455 U. S., at 520.

Stay and abeyance, if employed too frequently, has the potential to undermine these twin purposes. Staying a federal habeas petition frustrates AEDPA's objective of encouraging finality by allowing a petitioner to delay the resolution of the federal proceedings. It also undermines AEDPA's goal of streamlining federal habeas proceedings by decreasing a petitioner's incentive to exhaust all his claims in state court prior to filing his federal petition. Cf. *Duncan*, *supra*, at 180 ("[D]iminution of statutory incentives to proceed first in state court would . . . increase the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce").

For these reasons, stay and abeyance should be available only in limited circumstances. Because granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless. Cf. 28 U. S. C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State").

Even where stay and abeyance is appropriate, the district court's discretion in structuring the stay is limited by the timeliness concerns reflected in AEDPA. A mixed petition should not be stayed indefinitely. Though, generally, a prisoner's "principal interest . . . is in obtaining speedy federal relief on his claims," *Lundy*, *supra*, at 520 (plurality opinion), not all petitioners have an incentive to obtain federal relief as quickly as possible. In particular, capital petitioners might deliberately engage in dilatory tactics to prolong their

incarceration and avoid execution of the sentence of death. Without time limits, petitioners could frustrate AEDPA's goal of finality by dragging out indefinitely their federal habeas review. Thus, district courts should place reasonable time limits on a petitioner's trip to state court and back. See, *e. g.*, *Zarvela*, 254 F. 3d, at 381 ("[District courts] should explicitly condition the stay on the prisoner's pursuing state court remedies within a brief interval, normally 30 days, after the stay is entered and returning to federal court within a similarly brief interval, normally 30 days after state court exhaustion is completed"). And if a petitioner engages in abusive litigation tactics or intentional delay, the district court should not grant him a stay at all. See *id.*, at 380–381.

On the other hand, it likely would be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics. In such circumstances, the district court should stay, rather than dismiss, the mixed petition. See *Lundy*, 455 U. S., at 522 (the total exhaustion requirement was not intended to "unreasonably impair the prisoner's right to relief"). In such a case, the petitioner's interest in obtaining federal review of his claims outweighs the competing interests in finality and speedy resolution of federal petitions. For the same reason, if a petitioner presents a district court with a mixed petition and the court determines that stay and abeyance is inappropriate, the court should allow the petitioner to delete the unexhausted claims and to proceed with the exhausted claims if dismissal of the entire petition would unreasonably impair the petitioner's right to obtain federal relief. See *id.*, at 520 (plurality opinion) ("[A petitioner] can always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims").

The Court of Appeals erred to the extent it concluded that stay and abeyance is always impermissible. We therefore vacate the judgment of the Court of Appeals and remand the case for that court to determine, consistent with this opinion, whether the District Court's grant of a stay in this case constituted an abuse of discretion.

*It is so ordered.*

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring.

While I join the Court's opinion, I do so on the understanding that its reference to "good cause" for failing to exhaust state remedies more promptly, *ante*, at 277, is not intended to impose the sort of strict and inflexible requirement that would "'trap the unwary *pro se* prisoner.'" *Rose* v. *Lundy*, 455 U. S. 509, 520 (1982); see also *Slack* v. *McDaniel*, 529 U. S. 473, 487 (2000).

JUSTICE SOUTER, with whom JUSTICE GINSBURG and JUSTICE BREYER join, concurring in part and concurring in the judgment.

I join the Court's opinion with one reservation, not doctrinal but practical. Instead of conditioning stay-and-abeyance on "good cause" for delay, *ante*, at 277, I would simply hold the order unavailable on a demonstration of "intentionally dilatory litigation tactics," *ante*, at 278. The trickiness of some exhaustion determinations promises to infect issues of good cause when a court finds a failure to exhaust; *pro se* petitioners (as most habeas petitioners are) do not come well trained to address such matters. I fear that threshold enquiries into good cause will give the district courts too much trouble to be worth the time; far better to wait for the alarm to sound when there is some indication that a petitioner is gaming the system.

Syllabus

# EXXON MOBIL CORP. ET AL. *v.* SAUDI BASIC INDUSTRIES CORP.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 03–1696. Argued February 23, 2005—Decided March 30, 2005

The *Rooker-Feldman* doctrine, at issue in this case, has been applied by this Court only twice, in *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413, and in *District of Columbia Court of Appeals* v. *Feldman*, 460 U. S. 462. In *Rooker*, plaintiffs previously defeated in state court filed suit in a Federal District Court alleging that the adverse state-court judgment was unconstitutional and asking that it be declared "null and void." 263 U. S., at 414–415. Noting preliminarily that the state court had acted within its jurisdiction, this Court explained that if the state-court decision was wrong, "that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding." *Id.*, at 415. Federal district courts, *Rooker* recognized, are empowered to exercise only original, not appellate, jurisdictions. *Id.*, at 416. Because Congress has empowered this Court alone to exercise appellate authority "to reverse or modify" a state-court judgment, *ibid.*, the Court affirmed a decree dismissing the federal suit for lack of jurisdiction, *id.*, at 415, 417. In *Feldman*, two plaintiffs brought federal-court actions after the District of Columbia's highest court denied their petitions to waive a court Rule requiring D. C. bar applicants to have graduated from an accredited law school. Recalling *Rooker*, this Court observed that the District Court lacked authority to review a final judicial determination of the D. C. high court because such review "can be obtained only in this Court." 460 U. S., at 476. Concluding that the D. C. court's proceedings applying the accreditation Rule to the plaintiffs were "judicial in nature," *id.*, at 479–482, this Court ruled that the Federal District Court lacked subject-matter jurisdiction, *id.*, at 482. However, concluding also that, in promulgating the bar admission Rule, the D. C. court had acted legislatively, not judicially, *id.*, at 485–486, this Court held that 28 U. S. C. § 1257 did not bar the District Court from addressing the validity of the Rule itself, so long as the plaintiffs did not seek review of the Rule's application in a particular case, 460 U. S., at 486. Since *Feldman*, this Court has never applied *Rooker-Feldman* to dismiss an action for want of jurisdiction. However, the lower federal courts have variously interpreted the *Rooker-Feldman* doctrine to extend far beyond the contours of the *Rooker* and *Feldman* cases, over-

riding Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts, and superseding the ordinary application of preclusion law under 28 U. S. C. § 1738.

In this case, two subsidiaries of petitioner Exxon Mobil Corporation formed joint ventures with respondent Saudi Basic Industries Corp. (SABIC) to produce polyethylene in Saudi Arabia. When a dispute arose over royalties that SABIC had charged the joint ventures, SABIC preemptively sued the two subsidiaries in a Delaware state court, seeking a declaratory judgment that the royalties were proper. ExxonMobil and the subsidiaries then countersued in the Federal District Court, alleging that SABIC overcharged them. Before the state-court trial, which ultimately yielded a jury verdict of over $400 million for the ExxonMobil subsidiaries, the District Court denied SABIC's motion to dismiss the federal suit. On interlocutory appeal, over eight months after the state-court jury verdict, the Third Circuit, on its own motion, raised the question whether subject-matter jurisdiction over the federal suit failed under the *Rooker-Feldman* doctrine because ExxonMobil's claims had already been litigated in state court. The court did not question the District Court's subject-matter jurisdiction at the suit's outset, but held that federal jurisdiction terminated when the Delaware court entered judgment on the jury verdict.

*Held:* The *Rooker-Feldman* doctrine is confined to cases of the kind from which it acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the federal district court proceedings commenced and inviting district court review and rejection of those judgments. *Rooker-Feldman* does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines allowing federal courts to stay or dismiss proceedings in deference to state-court actions. Pp. 291–294.

(a) *Rooker* and *Feldman* exhibit the limited circumstances in which this Court's appellate jurisdiction over state-court judgments, § 1257, precludes a federal district court from exercising subject-matter jurisdiction in an action it would otherwise be empowered to adjudicate under a congressional grant of authority. In both cases, the plaintiffs, alleging federal-question jurisdiction, called upon the District Court to overturn an injurious state-court judgment. Because § 1257, as long interpreted, vests authority to review a state-court judgment solely in this Court, *e. g., Feldman*, 460 U. S., at 476, the District Courts lacked subject-matter jurisdiction, see, *e. g., Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.*, 535 U. S. 635, 644, n. 3. When there is parallel state and federal litigation, *Rooker-Feldman* is not triggered simply by the entry of judgment in state court. See, *e. g., McClellan* v. *Carland*, 217

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U. S. 268, 282. Comity or abstention doctrines may, in various circumstances, permit or require the federal court to stay or dismiss the federal action in favor of the state-court litigation. See, *e. g.*, *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800. But neither *Rooker* nor *Feldman* supports the notion that properly invoked concurrent jurisdiction vanishes if a state court reaches judgment on the same or a related question while the case remains *sub judice* in a federal court. Disposition of the federal action, once the state-court adjudication is complete, would be governed by preclusion law. Under 28 U. S. C. § 1738, federal courts must "give the same preclusive effect to a state-court judgment as another court of that State would give." *Parsons Steel, Inc.* v. *First Alabama Bank*, 474 U. S. 518, 523. Preclusion is not a jurisdictional matter. See Fed. Rule Civ. Proc. 8(c). In parallel litigation, a federal court may be bound to recognize the claim- and issue-preclusive effects of a state-court judgment, but federal jurisdiction over an action does not terminate automatically on the entry of judgment in the state court. Nor does § 1257 stop a district court from exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court. If a federal plaintiff presents an independent claim, even one that denies a state court's legal conclusion in a case to which the plaintiff was a party, there is jurisdiction, and state law determines whether the defendant prevails under preclusion principles. Pp. 291–293.

(b) The *Rooker-Feldman* doctrine does not preclude the federal court from proceeding in this case. ExxonMobil has not repaired to federal court to undo the Delaware judgment in its favor, but appears to have filed its federal-court suit (only two weeks after SABIC filed in Delaware and well before any judgment in state court) to protect itself in the event it lost in state court on grounds (such as the state statute of limitations) that might not preclude relief in the federal venue. *Rooker-Feldman* did not prevent the District Court from exercising jurisdiction when ExxonMobil filed the federal action, and it did not emerge to vanquish jurisdiction after ExxonMobil prevailed in the Delaware courts. The Third Circuit misperceived the narrow ground occupied by *Rooker-Feldman*, and consequently erred in ordering the federal action dismissed. Pp. 293–294.

364 F. 3d 102, reversed and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court.

*Gregory S. Coleman* argued the cause for petitioners. With him on the briefs were *Christian J. Ward*, *James W. Quinn*, *David Lender*, and *Andrew S. Pollis*.

*Gregory A. Castanias* argued the cause for respondent. With him on the briefs were *Lawrence D. Rosenberg, William K. Shirey II,* and *Kenneth R. Adamo.**

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns what has come to be known as the *Rooker-Feldman* doctrine, applied by this Court only twice, first in *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413 (1923), then, 60 years later, in *District of Columbia Court of Appeals* v. *Feldman*, 460 U. S. 462 (1983). Variously interpreted in the lower courts, the doctrine has sometimes been construed to extend far beyond the contours of the *Rooker* and *Feldman* cases, overriding Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts, and superseding the ordinary application of preclusion law pursuant to 28 U. S. C. § 1738. See, *e. g., Moccio* v. *New York State Office of Court Admin.*, 95 F. 3d 195, 199–200 (CA2 1996).

*Rooker* was a suit commenced in Federal District Court to have a judgment of a state court, adverse to the federal court plaintiffs, "declared null and void." 263 U. S., at 414. In *Feldman*, parties unsuccessful in the District of Columbia Court of Appeals (the District's highest court) commenced a federal-court action against the very court that had rejected their applications. Holding the federal suits impermissible, we emphasized that appellate jurisdiction to reverse or modify a state-court judgment is lodged, initially by § 25 of the Judiciary Act of 1789, 1 Stat. 85, and now by 28 U. S. C. § 1257, exclusively in this Court. Federal district courts, we noted, are empowered to exercise original, not appellate, jurisdiction. Plaintiffs in *Rooker* and *Feldman* had litigated and lost in state court. Their federal complaints, we observed, essentially invited federal courts of first instance to review and reverse unfavorable state-court judgments. We

**Nancie G. Marzulla* and *Roger J. Marzulla* filed a brief for Defenders of Property Rights et al. as *amici curiae.*

declared such suits out of bounds, *i. e.*, properly dismissed for want of subject-matter jurisdiction.

The *Rooker-Feldman* doctrine, we hold today, is confined to cases of the kind from which the doctrine acquired its name: cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments. *Rooker-Feldman* does not otherwise override or supplant preclusion doctrine or augment the circumscribed doctrines that allow federal courts to stay or dismiss proceedings in deference to state-court actions.

In the case before us, the Court of Appeals for the Third Circuit misperceived the narrow ground occupied by *Rooker-Feldman*, and consequently erred in ordering the federal action dismissed for lack of subject-matter jurisdiction. We therefore reverse the Third Circuit's judgment.

## I

In *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413, the parties defeated in state court turned to a Federal District Court for relief. Alleging that the adverse state-court judgment was rendered in contravention of the Constitution, they asked the federal court to declare it "null and void." *Id.*, at 414–415. This Court noted preliminarily that the state court had acted within its jurisdiction. *Id.*, at 415. If the state-court decision was wrong, the Court explained, "that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding." *Ibid.* Federal district courts, the *Rooker* Court recognized, lacked the requisite appellate authority, for their jurisdiction was "strictly original." *Id.*, at 416. Among federal courts, the *Rooker* Court clarified, Congress had empowered only this Court to exercise appellate authority "to reverse or modify" a state-court judgment. *Ibid.*

Accordingly, the Court affirmed a decree dismissing the suit for lack of jurisdiction. *Id.*, at 415, 417.

Sixty years later, the Court decided *District of Columbia Court of Appeals* v. *Feldman*, 460 U. S. 462. The two plaintiffs in that case, Hickey and Feldman, neither of whom had graduated from an accredited law school, petitioned the District of Columbia Court of Appeals to waive a court Rule that required D. C. bar applicants to have graduated from a law school approved by the American Bar Association. After the D. C. court denied their waiver requests, Hickey and Feldman filed suits in the United States District Court for the District of Columbia. *Id.*, at 465–473. The District Court and the Court of Appeals for the District of Columbia Circuit disagreed on the question whether the federal suit could be maintained, and we granted certiorari. *Id.*, at 474–475.

Recalling *Rooker*, this Court's opinion in *Feldman* observed first that the District Court lacked authority to review a final judicial determination of the D. C. high court. "Review of such determinations," the *Feldman* opinion reiterated, "can be obtained only in this Court." 460 U. S., at 476. The "crucial question," the Court next stated, was whether the proceedings in the D. C. court were "judicial in nature." *Ibid.* Addressing that question, the Court concluded that the D. C. court had acted both judicially and legislatively.

In applying the accreditation Rule to the Hickey and Feldman waiver petitions, this Court determined, the D. C. court had acted judicially. *Id.*, at 479–482. As to that adjudication, *Feldman* held, this Court alone among federal courts had review authority. Hence, "to the extent that Hickey and Feldman sought review in the District Court of the District of Columbia Court of Appeals' denial of their petitions for waiver, the District Court lacked subject-matter jurisdiction over their complaints." *Id.*, at 482. But that determination did not dispose of the entire case, for in promulgating

the bar admission rule, this Court said, the D. C. court had acted legislatively, not judicially. *Id.*, at 485–486. "Challenges to the constitutionality of state bar rules," the Court elaborated, "do not necessarily require a United States district court to review a final state-court judgment in a judicial proceeding." *Id.*, at 486. Thus, the Court reasoned, 28 U. S. C. § 1257 did not bar District Court proceedings addressed to the validity of the accreditation Rule itself. *Feldman*, 460 U. S., at 486. The Rule could be contested in federal court, this Court held, so long as plaintiffs did not seek review of the Rule's application in a particular case. *Ibid.*

The Court endeavored to separate elements of the Hickey and Feldman complaints that failed the jurisdictional threshold from those that survived jurisdictional inspection. Plaintiffs had urged that the District of Columbia Court of Appeals acted arbitrarily in denying the waiver petitions of Hickey and Feldman, given that court's "former policy of granting waivers to graduates of unaccredited law schools." *Ibid.* That charge, the Court held, could not be pursued, for it was "inextricably intertwined with the District of Columbia Court of Appeals' decisions, in judicial proceedings, to deny [plaintiffs'] petitions." *Id.*, at 486–487.[1]

On the other hand, the Court said, plaintiffs could maintain "claims that the [bar admission] rule is unconstitutional because it creates an irrebuttable presumption that only graduates of accredited law schools are fit to practice law, discriminates against those who have obtained equivalent legal training by other means, and impermissibly delegates the District of Columbia Court of Appeals' power to regulate the

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[1] Earlier in the opinion the Court had used the same expression. In a footnote, the Court explained that a district court could not entertain constitutional claims attacking a state-court judgment, even if the state court had not passed directly on those claims, when the constitutional attack was "inextricably intertwined" with the state court's judgment. *Feldman*, 460 U. S., at 482, n. 16.

bar to the American Bar Association," for those claims "do not require review of a judicial decision in a particular case." *Id.*, at 487. The Court left open the question whether the doctrine of res judicata foreclosed litigation of the elements of the complaints spared from dismissal for want of subject-matter jurisdiction. *Id.*, at 487–488.

Since *Feldman*, this Court has never applied *Rooker-Feldman* to dismiss an action for want of jurisdiction. The few decisions that have mentioned *Rooker* and *Feldman* have done so only in passing or to explain why those cases did not dictate dismissal. See *Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.*, 535 U. S. 635, 644, n. 3 (2002) (*Rooker-Feldman* does not apply to a suit seeking review of state agency action); *Johnson* v. *De Grandy*, 512 U. S. 997, 1005–1006 (1994) (*Rooker-Feldman* bars a losing party in state court "from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights," but the doctrine has no application to a federal suit brought by a nonparty to the state suit.); *Howlett* v. *Rose*, 496 U. S. 356, 369–370, n. 16 (1990) (citing *Rooker* and *Feldman* for "the rule that a federal district court cannot entertain an original action alleging that a state court violated the Constitution by giving effect to an unconstitutional state statute"); *ASARCO Inc.* v. *Kadish*, 490 U. S. 605, 622–623 (1989) (If, instead of seeking review of an adverse state supreme court decision in the Supreme Court, petitioners sued in federal district court, the federal action would be an attempt to obtain direct review of the state supreme court decision and would "represent a partial inroad on *Rooker-Feldman*'s construction of 28 U. S. C. § 1257."); [2] *Pennzoil Co.* v. *Texaco Inc.*,

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[2] Respondent Saudi Basic Industries Corp. urges that *ASARCO Inc.* v. *Kadish*, 490 U. S. 605 (1989), expanded *Rooker-Feldman*'s jurisdictional bar to include federal actions that simply raise claims previously litigated in state court. Brief for Respondent 20–22. This is not so. In

481 U. S. 1, 6–10 (1987) (abstaining under *Younger* v. *Harris*, 401 U. S. 37 (1971), rather than dismissing under *Rooker-Feldman*, in a suit that challenged Texas procedures for enforcing judgments); 481 U. S., at 18 (SCALIA, J., concurring) (The "so-called *Rooker-Feldman* doctrine" does not deprive the Court of jurisdiction to decide Texaco's challenge to the Texas procedures); *id.*, at 21 (Brennan, J., concurring in judgment) (*Rooker* and *Feldman* do not apply; Texaco filed its federal action to protect its "right to a meaningful opportunity for appellate review, not to challenge the merits of the Texas suit."). But cf. 481 U. S., at 25–26 (Marshall, J., concurring in judgment) (*Rooker-Feldman* would apply because Texaco's claims necessarily called for review of the merits of its state appeal). See also *Martin* v. *Wilks*, 490 U. S. 755, 783–784, n. 21 (1989) (STEVENS, J., dissenting) (it would be anomalous to allow courts to sit in review of judgments entered by courts of equal, or greater, authority (citing *Rooker* and *Feldman*)).[3]

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*ASARCO*, the petitioners (defendants below in the state-court action) sought review in this Court of the Arizona Supreme Court's invalidation of a state statute governing mineral leases on state lands. 490 U. S., at 610. This Court dismissed the suggestion of the United States that the petitioners should have pursued their claim as a new action in federal district court. Such an action, we said, "in essence, would be an attempt to obtain direct review of the Arizona Supreme Court's decision in the lower federal courts" in contravention of 28 U. S. C. § 1257. 490 U. S., at 622–623. The injury of which the petitioners (the losing parties in state court) could have complained in the hypothetical federal suit would have been caused by the state court's invalidation of their mineral leases, and the relief they would have sought would have been to undo the state court's invalidation of the statute. The hypothetical suit in *ASARCO*, therefore, shares the characteristics of the suits in *Rooker* and *Feldman*, *i. e.*, loser in state court invites federal district court to overturn state-court judgment.

[3] Between 1923, when the Court decided *Rooker*, and 1983, when it decided *Feldman*, the Court cited *Rooker* in one opinion, *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U. S. 275, 283 (1946), in reference to the finality of prior judgments. See *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413, 415 (1923) ("Unless and until . . . reversed or modified, [the state-court judgment] would be an effective and conclusive adjudication."). *Rooker*'s

II

In 1980, two subsidiaries of petitioner Exxon Mobil Corporation (then the separate companies Exxon Corp. and Mobil Corp.) formed joint ventures with respondent Saudi Basic Industries Corp. (SABIC) to produce polyethylene in Saudi Arabia. 194 F. Supp. 2d 378, 384 (NJ 2002). Two decades later, the parties began to dispute royalties that SABIC had charged the joint ventures for sublicenses to a polyethylene manufacturing method. 364 F. 3d 102, 103 (CA3 2004).

SABIC preemptively sued the two ExxonMobil subsidiaries in Delaware Superior Court in July 2000 seeking a declaratory judgment that the royalty charges were proper under the joint venture agreements. 194 F. Supp. 2d, at 385–386. About two weeks later, ExxonMobil and its subsidiaries countersued SABIC in the United States District Court for the District of New Jersey, alleging that SABIC overcharged the joint ventures for the sublicenses. *Id.*, at 385; App. 3. ExxonMobil invoked subject-matter jurisdiction in the New Jersey action under 28 U. S. C. § 1330, which authorizes district courts to adjudicate actions against foreign states. 194 F. Supp. 2d, at 401.[4]

In January 2002, the ExxonMobil subsidiaries answered SABIC's state-court complaint, asserting as counterclaims the same claims ExxonMobil had made in the federal suit in New Jersey. 364 F. 3d, at 103. The state suit went to trial in March 2003, and the jury returned a verdict of over $400 million in favor of the ExxonMobil subsidiaries. *Ibid.*; *Saudi Basic Industries Corp.* v. *Mobil Yanbu Petrochemical Co.*, 866 A. 2d 1, 11 (Del. 2005). SABIC appealed the judgment entered on the verdict to the Delaware Supreme Court.

Before the state-court trial, SABIC moved to dismiss the federal suit, alleging, *inter alia*, immunity under the Foreign

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only other appearance in the United States Reports before 1983 occurs in Justice White's dissent from denial of certiorari in *Florida State Bd. of Dentistry* v. *Mack*, 401 U. S. 960, 961 (1971).

[4] SABIC is a Saudi Arabian corporation, 70% owned by the Saudi Government and 30% owned by private investors. 194 F. Supp. 2d, at 384.

Sovereign Immunities Act of 1976, 28 U. S. C. § 1602 *et seq.* (2000 ed. and Supp. II). The Federal District Court denied SABIC's motion to dismiss. 194 F. Supp. 2d, at 401–407, 416–417. SABIC took an interlocutory appeal, and the Court of Appeals heard argument in December 2003, over eight months after the state-court jury verdict. 364 F. 3d, at 103–104.[5]

The Court of Appeals, on its own motion, raised the question whether "subject matter jurisdiction over this case fails under the *Rooker-Feldman* doctrine because ExxonMobil's claims have already been litigated in state court." *Id.*, at 104.[6] The court did not question the District Court's possession of subject-matter jurisdiction at the outset of the suit, but held that federal jurisdiction terminated when the Delaware Superior Court entered judgment on the jury verdict. *Id.*, at 104–105. The court rejected ExxonMobil's argument that *Rooker-Feldman* could not apply because ExxonMobil filed its federal complaint well before the state-court judgment. The only relevant consideration, the court stated, "is whether the state judgment precedes a federal judgment on the same claims." 364 F. 3d, at 105. If *Rooker-Feldman* did not apply to federal actions filed prior to a state-court judgment, the Court of Appeals worried, "we would be encouraging parties to maintain federal actions as 'insurance policies' while their state court claims were pending." 364 F. 3d, at 105. Once ExxonMobil's claims had been litigated to a judgment in state court, the Court of Appeals held, *Rooker-Feldman* "preclude[d] [the] federal district court

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[5] At ExxonMobil's request, the Court of Appeals initially stayed its consideration of the appeal to await resolution of the proceedings in Delaware. App. 9–10. In November 2003, shortly after SABIC filed its appeal in the Delaware Supreme Court, the Court of Appeals, on SABIC's motion, lifted the stay and set the appeal for argument. *Id.*, at 11–13.

[6] One day before argument, the Court of Appeals directed the parties to be prepared to address whether the *Rooker-Feldman* doctrine deprived the District Court of jurisdiction over the case. App. 17.

from proceeding." 364 F. 3d, at 104 (internal quotation marks omitted).

ExxonMobil, at that point prevailing in Delaware, was not seeking to overturn the state-court judgment. Nevertheless, the Court of Appeals hypothesized that, if SABIC won on appeal in Delaware, ExxonMobil would be endeavoring in the federal action to "invalidate" the state-court judgment, "the very situation," the court concluded, "contemplated by *Rooker-Feldman*'s 'inextricably intertwined' bar." *Id.*, at 106.

We granted certiorari, 543 U. S. 924 (2004), to resolve conflict among the Courts of Appeals over the scope of the *Rooker-Feldman* doctrine. We now reverse the judgment of the Court of Appeals for the Third Circuit.[7]

## III

*Rooker* and *Feldman* exhibit the limited circumstances in which this Court's appellate jurisdiction over state-court judgments, 28 U. S. C. § 1257, precludes a United States district court from exercising subject-matter jurisdiction in an action it would otherwise be empowered to adjudicate under a congressional grant of authority, *e. g.*, § 1330 (suits against foreign states), § 1331 (federal question), and § 1332 (diversity). In both cases, the losing party in state court filed suit in federal court after the state proceedings ended, complaining of an injury caused by the state-court judgment and seeking review and rejection of that judgment. Plaintiffs in both cases, alleging federal-question jurisdiction, called upon

[7] SABIC contends that this case is moot because the Delaware Supreme Court has affirmed the trial-court judgment in favor of ExxonMobil, *Saudi Basic Industries Corp.* v. *Mobil Yanbu Petrochemical Co.*, 866 A. 2d 1 (2005), and has denied reargument en banc, *Saudi Basic Industries Corp.* v. *Mobil Yanbu Petrochemical Co.*, No. 493, 2003 (Feb. 22, 2005). Brief for Respondent 10–13. SABIC continues to oppose the Delaware judgment, however, and has represented that it will petition this Court for a writ of certiorari. Tr. of Oral Arg. 22–23. The controversy therefore remains live.

the District Court to overturn an injurious state-court judgment. Because § 1257, as long interpreted, vests authority to review a state court's judgment solely in this Court, *e. g.*, *Feldman*, 460 U. S., at 476; *Atlantic Coast Line R. Co.* v. *Locomotive Engineers*, 398 U. S. 281, 286 (1970); *Rooker*, 263 U. S., at 416, the District Courts in *Rooker* and *Feldman* lacked subject-matter jurisdiction. See *Verizon Md. Inc.*, 535 U. S., at 644, n. 3 ("The *Rooker-Feldman* doctrine merely recognizes that 28 U. S. C. § 1331 is a grant of original jurisdiction, and does not authorize district courts to exercise appellate jurisdiction over state-court judgments, which Congress has reserved to this Court, see § 1257(a).").[8]

When there is parallel state and federal litigation, *Rooker-Feldman* is not triggered simply by the entry of judgment in state court. This Court has repeatedly held that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction." *McClellan* v. *Carland*, 217 U. S. 268, 282 (1910); accord *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 928 (1975); *Atlantic Coast Line R. Co.*, 398 U. S., at 295. Comity or abstention doctrines may, in various circumstances, permit or require the federal court to stay or dismiss the federal action in favor of the state-court litigation. See, *e. g.*, *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800 (1976); *Younger* v. *Harris*, 401 U. S. 37 (1971); *Burford* v. *Sun Oil Co.*, 319 U. S. 315 (1943); *Railroad Comm'n of Tex.* v. *Pullman Co.*, 312 U. S. 496 (1941). But neither *Rooker* nor *Feldman* supports the notion that properly invoked concurrent jurisdiction vanishes if a state court reaches judgment on the same or related question while the case remains *sub judice* in a federal court.

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[8] Congress, if so minded, may explicitly empower district courts to oversee certain state-court judgments and has done so, most notably, in authorizing federal habeas review of state prisoners' petitions. 28 U. S. C. § 2254(a).

Disposition of the federal action, once the state-court adjudication is complete, would be governed by preclusion law. The Full Faith and Credit Act, 28 U. S. C. § 1738, originally enacted in 1790, ch. 11, 1 Stat. 122, requires the federal court to "give the same preclusive effect to a state-court judgment as another court of that State would give." *Parsons Steel, Inc.* v. *First Alabama Bank*, 474 U. S. 518, 523 (1986); accord *Matsushita Elec. Industrial Co.* v. *Epstein*, 516 U. S. 367, 373 (1996); *Marrese* v. *American Academy of Orthopaedic Surgeons*, 470 U. S. 373, 380–381 (1985). Preclusion, of course, is not a jurisdictional matter. See Fed. Rule Civ. Proc. 8(c) (listing res judicata as an affirmative defense). In parallel litigation, a federal court may be bound to recognize the claim- and issue-preclusive effects of a state-court judgment, but federal jurisdiction over an action does not terminate automatically on the entry of judgment in the state court.

Nor does § 1257 stop a district court from exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court. If a federal plaintiff "present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party . . . , then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion." *GASH Assocs.* v. *Rosemont*, 995 F. 2d 726, 728 (CA7 1993); accord *Noel* v. *Hall*, 341 F. 3d 1148, 1163–1164 (CA9 2003).

This case surely is not the "paradigm situation in which *Rooker-Feldman* precludes a federal district court from proceeding." 364 F. 3d, at 104 (quoting *E. B.* v. *Verniero*, 119 F. 3d 1077, 1090–1091 (CA3 1997)). ExxonMobil plainly has not repaired to federal court to undo the Delaware judgment in its favor. Rather, it appears ExxonMobil filed suit in Federal District Court (only two weeks after SABIC filed in Delaware and well before any judgment in state court) to

protect itself in the event it lost in state court on grounds (such as the state statute of limitations) that might not preclude relief in the federal venue. Tr. of Oral Arg. 46; App. 35–36.[9] *Rooker-Feldman* did not prevent the District Court from exercising jurisdiction when ExxonMobil filed the federal action, and it did not emerge to vanquish jurisdiction after ExxonMobil prevailed in the Delaware courts.

* * *

For the reasons stated, the judgment of the Court of Appeals for the Third Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

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[9] The Court of Appeals criticized ExxonMobil for pursuing its federal suit as an "insurance policy" against an adverse result in state court. 364 F. 3d 102, 105–106 (CA3 2004). There is nothing necessarily inappropriate, however, about filing a protective action. See, *e. g.*, *Rhines* v. *Weber*, *ante*, at 277–278 (permitting a federal district court to stay a federal habeas action and hold the petition in abeyance while a petitioner exhausts claims in state court); *Union Pacific R. Co.* v. *Department of Revenue of Ore.*, 920 F. 2d 581, 584, and n. 9 (CA9 1990) (noting that the railroad company had filed protective actions in state court to prevent expiration of the state statute of limitations); *Government of Virgin Islands* v. *Neadle*, 861 F. Supp. 1054, 1055 (MD Fla. 1994) (staying an action brought by plaintiffs "to protect themselves" in the event that personal jurisdiction over the defendants failed in the United States District Court for the Virgin Islands); see also *England* v. *Louisiana Bd. of Medical Examiners*, 375 U. S. 411, 421 (1964) (permitting a party to reserve litigation of federal constitutional claims for federal court while a state court resolves questions of state law).

Syllabus

# JOHNSON *v.* UNITED STATES

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 03–9685. Argued January 18, 2005—Decided April 4, 2005

Following petitioner Johnson's 1994 guilty plea on a federal drug charge, the District Court gave him an enhanced sentence as a career offender under the federal Sentencing Guidelines based on two prior Georgia drug convictions. On appeal, Johnson argued for the first time that he should not have received an enhanced sentence because one of the predicate Georgia convictions was invalid, but the Eleventh Circuit affirmed his sentence and this Court denied certiorari. Two days later, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) went into effect, imposing, among other things, a 1-year statute of limitations on motions by prisoners seeking to modify their federal sentences. The 1-year period runs from the latest of four alternative dates, the last of which is "the date on which the facts supporting the claim . . . could have been discovered through the exercise of due diligence," 28 U. S. C. § 2255, ¶ 6(4). A fifth option supplied by the Courts of Appeals gave prisoners whose convictions became final before AEDPA a 1-year grace period running from that statute's effective date. On April 25, 1997, one year and three days after his pre-AEDPA federal conviction became final and just after the 1-year grace period expired, Johnson *pro se* filed a motion in the District Court for an extension of time to attack his federal sentence under § 2255. Finding the AEDPA period expired, the court denied the motion, but without prejudice to Johnson's right to file a § 2255 motion claiming any alternative limitation period under the statute. On February 6, 1998, Johnson filed a habeas petition in a Georgia state court, claiming the constitutional invalidity of his guilty pleas in seven cases, one of which was the basis for one of the convictions on which his federal sentence enhancement rested. Some three months after the state court entered an order of vacatur reversing all seven convictions, Johnson filed *pro se* a § 2255 motion to vacate his enhanced federal sentence in light of the state-court vacatur. He claimed, in effect, that his motion was timely because the order vacating the state judgment constituted previously undiscoverable "facts supporting the claim" that triggered a renewed limitation period under § 2255, ¶ 6(4). Although Johnson asserted that lack of education excused him from acting more promptly, and that he had filed the state petition as soon as he could get help from an inmate law clerk, the District Court denied

the motion as untimely. The Eleventh Circuit affirmed, reasoning that the state-court vacatur order was not a "fact" discovered by Johnson under the fourth paragraph of the § 2255 limitation rule, but was more properly classified as a legal proposition or a court action obtained at Johnson's behest.

*Held:* In a case in which a prisoner collaterally attacks his federal sentence on the ground that a state conviction used to enhance that sentence has since been vacated, § 2255, ¶ 6(4)'s 1-year limitation period begins to run when the petitioner receives notice of the order vacating the prior conviction, provided that he has sought it with due diligence in state court after entry of judgment in the federal case in which the sentence was enhanced. Pp. 302–311.

(a) This Court agrees with Johnson that the state-court order vacating his prior conviction is a matter of "fact" supporting his § 2255 claim, discovery of which triggers the refreshed 1-year limitation period under the fourth paragraph. By pegging that period to notice of the state order eliminating the predicate required for enhancement, which is almost always necessary and always sufficient for relief, Johnson's argument improves on the Government's proposal that the relevant "facts" are those on which Johnson based his challenge to the validity of his state convictions. Moreover, Johnson's argument is not vulnerable to the Eleventh Circuit's point that an order vacating a conviction is legally expressive or operative language that may not be treated as a matter of fact within the statute's meaning. This Court commonly speaks of the "fact of a prior conviction," *e. g.*, *Apprendi* v. *New Jersey*, 530 U. S. 466, 490, and an order vacating a predicate conviction is spoken of as a fact just as sensibly as the order entering it. In either case, a claim of such a fact is subject to proof or disproof like any other factual issue. Nevertheless, Johnson's take on the statute does carry anomalies, one minor, one more serious. It is strange to say that an order vacating a conviction has been "discovered," the term used by paragraph four, and stranger still to speak about the date on which it could have been discovered with due diligence, when the fact happens to be the outcome of a proceeding in which the § 2255 petitioner was the moving party. The more serious problem is Johnson's position that his § 2255 petition is timely under paragraph four as long as he brings it within a year of learning he succeeded in attacking the prior conviction, no matter how long he may have slumbered before starting the successful proceeding. Neither anomaly is serious enough, however, to justify rejecting Johnson's basic argument. The Court's job here is to find a sensible way to apply paragraph four when AEDPA's drafters probably never thought about the present situation. The answer to the question of how to im-

plement the statutory mandate that a petitioner act with "due diligence" in discovering the crucial fact of a vacatur order that he himself seeks is that he take prompt action as soon as he is in a position to realize that he has an interest in challenging the prior conviction with its potential to enhance the later sentence. The particular time when the course of the later federal prosecution clearly shows that diligence is in order is the date of judgment. After the entry of judgment, the § 2255 claim's subject has come into being, the significance of inaction is clear, and very little litigation would be wasted, since most challenged federal convictions are in fact sustained. Thus, from the date the District Court entered judgment in his federal case, Johnson was obliged to act diligently to obtain the state-court order vacating his predicate conviction. Had he done so, the 1-year limitation period would have run from the date he received notice of that vacatur. Pp. 302–310.

(b) However, Johnson did not show due diligence in seeking the state-court order vacating his predicate conviction. Although he knew the conviction subjected him to the enhancement, he failed to attack it by filing his state habeas petition until more than three years after entry of judgment in the federal case. Indeed, even if this Court moved the burden of diligence ahead to the date of finality of the federal conviction or to AEDPA's effective date two days later, Johnson would still have delayed unreasonably, having waited over 21 months. Johnson has offered no explanation for this delay, beyond that he was acting *pro se* and lacked the sophistication to understand the procedures. But the Court has never accepted *pro se* representation alone or procedural ignorance as an excuse for prolonged inattention when a statute's clear policy calls for promptness. On this record, Johnson fell far short of reasonable diligence in challenging the state conviction. Since there is every reason to believe that prompt action would have produced a state vacatur order well over a year before he filed his § 2255 petition, the fourth paragraph of § 2255 is unavailable, and Johnson does not suggest that his motion was timely under any other provision. P. 311.

340 F. 3d 1219, affirmed.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, THOMAS, and BREYER, JJ., joined. KENNEDY, J., filed a dissenting opinion, in which STEVENS, SCALIA, and GINSBURG, JJ., joined, *post*, p. 312.

*Courtland L. Reichman* argued the cause and filed briefs for petitioner.

*Dan Himmelfarb* argued the cause for the United States. With him on the brief were *Acting Solicitor General Clement, Assistant Attorney General Wray, Deputy Solicitor General Dreeben,* and *Nina Goodman.**

JUSTICE SOUTER delivered the opinion of the Court.

The question here is when the 1-year statute of limitations in 28 U. S. C. § 2255, ¶ 6(4), begins to run in a case of a prisoner's collateral attack on his federal sentence on the ground that a state conviction used to enhance that sentence has since been vacated. We hold that the period begins when a petitioner receives notice of the order vacating the prior conviction, provided that he has sought it with due diligence in state court, after entry of judgment in the federal case with the enhanced sentence.

## I

In 1994, petitioner Robert Johnson, Jr., was indicted for distributing cocaine base and related conspiracy. Following his guilty plea to a single count of distribution in violation of 21 U. S. C. § 841(a)(1) and 18 U. S. C. § 2, the presentence investigation report recommended that Johnson receive an enhanced sentence as a career offender under § 4B1.1 of the Federal Sentencing Guidelines, owing to his two 1989 convictions by the State of Georgia for distributing cocaine. Without elaboration, Johnson filed an objection to the recommendation, which he withdrew at the sentencing hearing. The District Court imposed the enhancement and entered judgment on November 29, 1994.

On appeal, Johnson argued for the first time that he should not have been sentenced as a career offender because one of

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**Donald F. Samuel* and *Michael Kennedy McIntyre* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging reversal.

his Georgia convictions was invalid.[1] The Court of Appeals for the Eleventh Circuit affirmed the sentence, finding that in the trial court Johnson had raised no objection to the validity of his prior convictions and that the judge's career offender findings were not clearly erroneous. *United States* v. *Johnson*, No. 94–9402 (Dec. 22, 1995) *(per curiam)*, App. 7. In a footnote, the Court of Appeals

> "note[d] in passing that, should appellant obtain at some future date the vacation of the state court conviction in question because [it was] obtained in violation of his constitutional rights, he could petition the district court under 28 U. S. C. § 2255 for the relief he now asks us to provide." *Id.*, at 8, n. 1.

We denied certiorari. *Johnson* v. *United States*, 517 U. S. 1162 (1996).

Two days later, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) went into effect, imposing, among other things, a 1-year period of limitations on motions by prisoners seeking to modify their federal sentences:

> "The limitation period shall run from the latest of—
>
> "(1) the date on which the judgment of conviction becomes final;
>
> "(2) the date on which the impediment to making a motion created by governmental action in violation of

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[1] The United States represents that Johnson specified invalid waiver of counsel in support of the claim. Brief for United States 7. The opinion of the Court of Appeals in Johnson's direct appeal, cited as authority by the Government, indicates only that Johnson claimed invalid waiver of his constitutional rights. *United States* v. *Johnson*, No. 94–9402 (CA11, Dec. 22, 1995) *(per curiam)*, App. 7, 8. While the Court of Appeals' opinion in the instant case specified that Johnson claimed a violation of his right to counsel, 340 F. 3d 1219, 1221 (2003), we know of nothing in the record indicating that either party ever argued that his objection could have been litigated under the *Gideon* exception recognized in *Custis* v. *United States*, 511 U. S. 485 (1994), see *infra*, at 303.

> the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> "(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> "(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 28 U. S. C. § 2255, ¶ 6.

A fifth option supplied uniformly by the Courts of Appeals gave prisoners whose convictions became final before AEDPA a 1-year grace period running from the new statute's effective date. *Duncan* v. *Walker*, 533 U. S. 167, 183, n. 1 (2001) (STEVENS, J., concurring in part and concurring in judgment) (collecting cases).

On April 25, 1997, one year and three days after his pre-AEDPA federal conviction became final and just after the 1-year grace period expired, Johnson *pro se* filed a motion in the District Court for a 60-day extension of time to attack his federal sentence under § 2255.[2] Finding the AEDPA period expired, the District Court denied the motion, though it added that denial was without prejudice to Johnson's right to file a § 2255 motion claiming any alternative limitation period under the statute.

On February 6, 1998, Johnson petitioned for writ of habeas corpus in the Superior Court of Wayne County, Georgia, claiming the invalidity of his guilty pleas in seven cases between 1983 and 1993 because he had not knowingly, intelligently, and voluntarily waived his right to counsel. One of the seven pleas Johnson challenged was the basis for one of

[2] April 25, 1997, is the date Johnson's motion was stamped filed in the District Court. Johnson did not contend below, and nothing in the record indicates, that his motion should have been deemed filed on an earlier date by operation of the so-called prison mailbox rule, see *Houston* v. *Lack*, 487 U. S. 266 (1988).

the 1989 convictions on which the District Court had rested the career offender enhancement of Johnson's federal sentence.[3] The State of Georgia denied Johnson's allegations, but filed no hearing transcripts. The Superior Court found that the records did "not show an affirmative waiver of [Johnson's] right to an attorney" in any of the cases, App. 10, and entered an order of vacatur, that all seven convictions be reversed, *ibid.*

Just over three months later, Johnson was back in the Federal District Court *pro se* with a motion under § 2255 to vacate the enhanced federal sentence following the vacatur of one of its predicate state convictions. He claimed his motion was timely because the order vacating the state judgment was "new evidence" not previously discoverable, and so the trigger of a renewed limitation period. The Magistrate Judge took Johnson to be relying on the discovery of "facts supporting the claim" addressed in § 2255, ¶ 6(4), but still recommended denial of the motion for failure on Johnson's part to exercise the "due diligence" required by that provision. *Id.*, at 15–17. Although Johnson objected that lack of education excused him from acting more promptly, and that he had filed the state petition as soon as he could get help from an inmate law clerk, the District Court denied the § 2255 motion as untimely. In the court's view, the applicable limitation was the 1-year grace period that was over in April 1997, which Johnson had done nothing to toll in the 21 months he waited after his conviction became final before filing his state habeas petition. *Id.*, at 19.

A divided panel of the Court of Appeals affirmed. 340 F. 3d 1219 (CA11 2003). The majority reasoned that the state-court order vacating the prior state conviction was not

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[3] Hindsight after *Daniels* v. *United States*, 532 U. S. 374 (2001), reveals that Johnson's claim likely would have brought his challenge within the *Gideon* exception, entitling him to attack the state conviction collaterally in a timely § 2255 motion after enhancement of his federal sentence, even without having first resorted to state court. See *infra*, at 304.

a "'fact'" under the fourth paragraph of the §2255 limitation rule. *Id.*, at 1223. In the majority's view, the state-court order was properly classified as a "legal proposition" or a "court action obtained at the behest of a federal prisoner, not 'discovered' by him." *Ibid.* Because the fourth paragraph of the limitation rule was therefore of no avail to Johnson, the Court of Appeals majority agreed with the District Court that the time for filing expired in 1997, at the end of the 1-year grace period. *Id.*, at 1226. The majority also agreed that Johnson had no equitable claim to toll the running of the 1-year period because he had waited too long before going back to the state court. *Id.*, at 1226–1228. Judge Roney dissented, arguing that the state court's order was a "fact" supporting Johnson's §2255 motion, a fact not discoverable prior to the order's issuance. *Id.*, at 1228–1229. Over one dissent, rehearing en banc was denied. 353 F. 3d 1328 (2003).

We granted certiorari, 542 U. S. 965 (2004), to resolve a disagreement among the Courts of Appeals as to whether vacatur of a prior state conviction used to enhance a federal sentence can start the 1-year limitation period under the fourth alternative of the §2255 rule. Compare 340 F. 3d 1219 (case below) (vacatur not a trigger); *Brackett* v. *United States*, 270 F. 3d 60 (CA1 2001) (same), with *United States* v. *Gadsen*, 332 F. 3d 224 (CA4 2003) (vacatur a fact not previously discoverable giving rise to a new 1-year period).

We agree with Johnson that the state-court vacatur is a matter of fact for purposes of the limitation rule in the fourth paragraph. But we also hold that the statute allows the fact of the state-court order to set the 1-year period running only if the petitioner has shown due diligence in seeking the order. Applying that qualification, we affirm.

## II

The Government shares Johnson's preliminary assumption that if he filed his §2255 motion in time, he is entitled to

federal resentencing now that the State has vacated one of the judgments supporting his enhanced sentence. Neither the enhancement provision of the Sentencing Guidelines applied here, nor the mandatory enhancement under the Armed Career Criminal Act (ACCA), 18 U. S. C. § 924(e), has been read to mean that the validity of a prior conviction supporting an enhanced federal sentence is beyond challenge. Cf. *Lewis* v. *United States*, 445 U. S. 55 (1980) (validity of prior conviction irrelevant under federal statute prohibiting possession of a firearm by a felon). Our cases applying these provisions assume the contrary, that a defendant given a sentence enhanced for a prior conviction is entitled to a reduction if the earlier conviction is vacated. *Custis* v. *United States*, 511 U. S. 485 (1994); *Daniels* v. *United States*, 532 U. S. 374 (2001).

Such was the premise in *Custis* v. *United States*, *supra*, even though we held that the ACCA generally created no opportunity to attack a prior state conviction collaterally at a federal sentencing proceeding, 511 U. S., at 490, and that the Constitution demands no more, *id.*, at 496–497. We thought that Congress had not meant to make it so easy to challenge final judgments that every occasion to enhance a sentence for recidivism would turn a federal sentencing court into a forum for difficult and time-consuming reexaminations of stale state proceedings. *Ibid.* We recognized only one exception to this rule that collateral attacks were off-limits, and that was for challenges to state convictions allegedly obtained in violation of the right to appointed counsel, an exception we thought necessary to avoid undermining *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). *Custis* v. *United States*, 511 U. S., at 494–496. As to challenges falling outside of that exception, we pointed out that a defendant who successfully attacked his state conviction in state court or on federal habeas review could then "apply for reopening of any federal sentence enhanced by the state sentences." *Id.*, at 497.

*Daniels* v. *United States*, *supra*, extended *Custis* to hold, subject to the same exception for *Gideon* claims, that a federal prisoner may not attack a predicate state conviction through a § 2255 motion challenging an enhanced federal sentence, 532 U. S., at 376, and again we stressed considerations of administration and finality, *id.*, at 378–380. Again, too, we acknowledged that a prisoner could proceed under § 2255 after successful review of the prior state conviction on federal habeas under § 2254 or favorable resort to any postconviction process available under state law, *id.*, at 381. We simply added that if the prior conviction was no longer open to direct or collateral attack in its own right, the federal prisoner could do nothing more about his sentence enhancement. *Id.*, at 382.[4]

This case presents the distinct issue of how soon a prisoner, successful in his state proceeding, must challenge the federal sentence under § 2255. The resolution turns on understanding what "facts" affecting an enhanced sentence could most sensibly fall within that term as used in the fourth paragraph of the § 2255 limitation provision, under which the one year runs from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." Johnson says that the order vacating his prior conviction is the factual matter supporting his § 2255 claim, discovery of which triggers the refreshed 1-year period. The Court of Appeals majority said no because it understood a legally operative order of vacatur to be a mandate of law or a consequence of applying law, and therefore distinct from a matter of "'fact'"

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[4] The *Daniels* Court allowed that "there may be rare cases in which no channel of review was actually available to a defendant with respect to a prior conviction, due to no fault of his own," in which case a prisoner might be able to use a motion under § 2255 to challenge the prior conviction as well as the federal sentence based on it. 532 U. S., at 383–384. As in *Daniels*, the circumstances of this case do not call for further exploration of that possibility.

as Congress used the term in § 2255. 340 F. 3d, at 1223. The United States does not endorse that law-fact distinction, but argues that the facts supporting Johnson's § 2255 claim, for purposes of the fourth paragraph, are the facts on which he based his challenge to the validity of his state convictions.

We think none of these positions is sound, at least in its entirety. As for the Government's proposed reading, certainly it is true that the circumstances rendering the underlying predicate conviction invalid are ultimate subjects of fact supporting the § 2255 claim, in the sense that proof of those facts (or the government's failure to negate them) is necessary to vacate the prior state conviction and eliminate the ground for the federal enhancement. But this is not enough to fit the Government's position comfortably into paragraph four. The text of § 2255, ¶ 6(4), clearly links the running of the limitation period to the discovery of the "facts supporting the claim or claims presented," but on the Government's view, the statute of limitations may begin to run (and may even expire) before the § 2255 claim and its necessary predicate even exist. Prior to the federal conviction, a petitioner has no § 2255 claim because he has no enhanced federal sentence to challenge; and prior to the state vacatur, which *Daniels* makes a necessary condition for relief in most cases, a petitioner cannot obtain relief under § 2255. Cf. *Bay Area Laundry and Dry Cleaning Pension Trust Fund* v. *Ferbar Corp. of Cal.*, 522 U. S. 192, 195 (1997) (statutes of limitations ordinarily do not begin to run until a plaintiff's complete cause of action has accrued). Hence, it is highly doubtful that in § 2255 challenges to enhanced sentences Congress would have meant to start the period running under paragraph four on the discoverability date of facts that may have no significance under federal law for years to come and that cannot by themselves be the basis of a § 2255 claim, *Daniels* v. *United States*, *supra*, at 376.

There are further reasons against applying the fourth paragraph as the Government would. Congress does not

appear to have adopted a policy of enhancing federal sentences regardless of the validity of state convictions relied on for the enhancement. *Custis* and *Daniels* were decided on just the contrary, and unchallenged, understanding; it would certainly push the limits of coherence for the Court now to apply the fourth paragraph in a way that would practically close the door to relief that each of those cases specifically left open.[5] Nor is there any reason to think Congress meant the limitation period to run earlier for the sake of preserving finality of state convictions; States are capable of providing their own limitations periods (and most of them would have barred Johnson's challenge).[6]

Johnson's argument improves on the Government's proposal by pegging the limitation period to notice of the state order eliminating the predicate required for enhancement, which is almost always necessary and always sufficient for relief. We do not find his proposal vulnerable to the point made by the majority of the Court of Appeals, that an order vacating a conviction is legally expressive or operative language that may not be treated as a matter of fact within the meaning of the statute. We commonly speak of the "fact of

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[5] It is also doubtful that Congress meant the federal limitation period to begin running, let alone expire, at a time when a typical state convict will have no inducement under federal law to act. On the Government's reading, in fact, a defendant could be obligated to act at a time when he had no real incentive for questioning the state conviction. Many of those convictions that in time become predicates for enhancing later sentences are, like the one here, the consequences of guilty pleas entered on terms defendants are willing to accept. Thus, a federal limitation rule obligating a defendant to turn around and attack a state guilty plea he has just entered would in practice place most predicate convictions beyond challenge as a matter of federal law.

[6] At the time Johnson filed his state habeas petition, Georgia law would have permitted him to wait indefinitely before seeking reversal of his 1989 convictions. The Georgia Legislature amended the state habeas statute in 2004 to create a 4-year statute of limitations for petitions for writs of habeas corpus. Ga. Code Ann. §9–14–42 (Lexis Supp. 2004).

a prior conviction," *e. g., Apprendi* v. *New Jersey*, 530 U. S. 466, 490 (2000), and an order vacating a predicate conviction is spoken of as a fact just as sensibly as the order entering it. In either case, a claim of such a fact is subject to proof or disproof like any other factual issue.

But Johnson's take on the statute carries anomalies of its own, one minor, one more serious. It is strange to say that an order vacating a conviction has been "discovered," the term used by paragraph four, and stranger still to speak about the date on which it could have been discovered with due diligence, when the fact happens to be the outcome of a proceeding in which the § 2255 petitioner was the moving party. By bringing that proceeding, the petitioner causes the factual event to occur, after all, and unless his mail goes astray his prompt discovery of the crucial fact is virtually guaranteed through official notice.

A more serious problem is Johnson's position that his § 2255 petition is timely under paragraph four as long as he brings it within a year of learning he succeeded in attacking the prior conviction, no matter how long he may have slumbered before starting the successful proceeding. If Johnson were right about this, a petitioner might wait a long time before raising any question about a predicate conviction, as this very case demonstrates. Of course it may well be that Johnson took his time because his basic sentence had years to run before the period of enhancement began. But letting a petitioner wait for as long as the enhancement makes no difference to his actual imprisonment, while the predicate conviction grows increasingly stale and the federal outcome is subject to question, is certainly at odds with the provision in paragraph four that the one year starts running when the operative fact "could have been discovered through the exercise of due diligence." And by maximizing the time that judgments are open to question, a rule allowing that kind of delay would thwart one of AEDPA's principal purposes,

*Duncan* v. *Walker*, 533 U. S., at 179; *Woodford* v. *Garceau*, 538 U. S. 202, 206 (2003), a purpose that was also central to our decisions in *Custis* and *Daniels*, see *supra*, at 303–304.

We think neither anomaly is serious enough, however, to justify rejecting Johnson's basic argument that notice of the order vacating the predicate conviction is the event that starts the one year running. Our job here is to find a sensible way to apply paragraph four when the truth is that with *Daniels* not yet on the books AEDPA's drafters probably never thought about the situation we face here. Of course it is peculiar to speak of "discovering" the fact of the very eventuality the petitioner himself has brought about, but when that fact is necessary to the § 2255 claim, and treating notice of it as the trigger produces a more reasonable scheme than the alternatives, the scheme should be reconciled with the statutory language if it can be. And here the fit is painless, if short on style.

While it sounds odd to speak of discovering a fact one has generated, a petitioner does not generate the fact of vacatur all by himself. He does, after all, have to learn of the court's response in the state proceeding, and receiving notice of success can surely qualify as a kind of discovery falling within the statutory language.

That leaves us with the question of how to implement the statutory mandate that a petitioner act with due diligence in discovering the crucial fact of the vacatur order that he himself seeks. The answer is that diligence can be shown by prompt action on the part of the petitioner as soon as he is in a position to realize that he has an interest in challenging the prior conviction with its potential to enhance the later sentence. The important thing is to identify a particular time when the course of the later federal prosecution clearly shows that diligence is in order. That might be the date the federal indictment is disclosed, the date of judgment, or the date of finality after direct appeal. Picking the first date would require the quickest response and serve finality best,

but it would produce some collateral litigation that federal acquittals would prove to have been needless, and it shares the same disconnection from the existence of a § 2255 claim as the Government's view of the relevant "facts," see *supra*, at 305–306. If we picked the third date, collateral litigation would be minimized, but finality would come late. This shapes up as a case for choosing the bowl of porridge between the one too hot and the one too cold, and settling on the date of judgment as the moment to activate due diligence seems best to reflect the statutory text and its underlying concerns. After the entry of judgment, the subject of the § 2255 claim has come into being, the significance of inaction is clear, and very little litigation would be wasted, since most challenged federal convictions are in fact sustained.

The dissent, like Johnson, would dispense with any due diligence requirement in seeking the state vacatur order itself, on the ground that the States can impose their own limitations periods on state collateral attacks, as most States do, *post*, at 316 (opinion of KENNEDY, J.). But the United States has an interest in the finality of sentences imposed by its own courts; § 2255 is, after all, concerned directly with federal cases. As to those federal cases, due diligence is not a "requirement of [our] own design," *post*, at 312, but an explicit demand in the text of § 2255, ¶ 6(4), one that reflects AEDPA's core purposes, *supra*, at 307–308. The requirement of due diligence must therefore demand something more than the dissent's willingness to accept no diligence at all, if the predicate conviction occurred in a State that itself imposes no limit of time for collaterally attacking its convictions.[7]

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[7] Certainly, as the dissent notes, *post*, at 318–319, "due diligence" is an inexact measure of how much delay is too much. But the imprecision here is no greater than elsewhere in the law when diligence must be shown, and the statute's use of an imprecise standard is no justification for depriving the statutory language of any meaning independent of corresponding state law, as the dissent would have us do. *Post*, at 319.

The dissent suggests that due diligence is satisfied by prompt discovery of the existence of the order vacating the state conviction. *Post*, at 314. Where one "discovers" a fact that one has helped to generate, however, *supra*, at 308–309, whether it be the result of a court proceeding or of some other process begun at the petitioner's behest, it does not strain logic to treat required diligence in the "discovery" of that fact as entailing diligence in the steps necessary for the existence of that fact. To see why this is so, one need only consider a more commonplace use of the paragraph four limitation rule. When a petitioner bases his § 2255 claim on the result of a DNA test, it is the result of the test that is the "fac[t] supporting the claim" in the § 2255 motion, and the 1-year limitation period therefore begins to run from the date the test result is "discovered." Yet unless it is to be read out of the statute, the due diligence requirement would say that the test result only triggers a new 1-year period if the petitioner began the testing process with reasonable promptness once the DNA sample and testing technology were available. Under the dissent's view, however, the petitioner could wait untold years (perhaps until the death of a key prosecution witness) before calling for the DNA test, yet once he "discovered" the result of that test, he would get the benefit of a rejuvenated 1-year period regardless of his lengthy delay. Such a result simply cannot be squared with the statute's plain text and purpose.

We accordingly apply the fourth paragraph in the situation before us by holding that from November 29, 1994, the date the District Court entered judgment in his federal case, Johnson was obliged to act diligently to obtain the state-court order vacating his predicate conviction. Had he done so, the 1-year limitation period would have run from the date he received notice of that vacatur.[8]

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[8] Once a petitioner diligently has initiated state-court proceedings, any delay in those proceedings that is not attributable to the petitioner will not impair the availability of the paragraph four limitation rule, once those

III

Although Johnson knew that his conviction subjected him to the career offender enhancement, he failed to attack the predicate for enhancement by filing his state habeas petition until February 1998, more than three years after entry of judgment in the federal case. Indeed, even if we moved the burden of diligence ahead to the date of finality of the federal conviction or to AEDPA's effective date two days later, Johnson would still have delayed unreasonably, having waited over 21 months. Johnson has offered no explanation for this delay, beyond observing that he was acting *pro se* and lacked the sophistication to understand the procedures. But we have never accepted *pro se* representation alone or procedural ignorance as an excuse for prolonged inattention when a statute's clear policy calls for promptness, and on this record we think Johnson fell far short of reasonable diligence in challenging the state conviction. Since there is every reason to believe that prompt action would have produced a state vacatur order well over a year before he filed his § 2255 petition, the fourth paragraph of § 2255 is unavailable, and Johnson does not suggest that his motion was timely under any other provision.

We accordingly affirm the judgment of the Court of Appeals.

*It is so ordered.*

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proceedings finally conclude. We further recognize that the facts underlying the challenge to the state-court conviction might themselves not be discoverable through the exercise of due diligence until after the date of the federal judgment. In such circumstances, once the facts become discoverable and the prisoner proceeds diligently to state court, the limitation period will run from the date of notice of the eventual state-court vacatur. Finally, we note that a petitioner who has been inadequately diligent can still avail himself of paragraph four if he can show that he filed the § 2255 motion within a year of the date he would have received notice of vacatur if he had acted promptly, though this may be a difficult showing.

JUSTICE KENNEDY, with whom JUSTICE STEVENS, JUSTICE SCALIA, and JUSTICE GINSBURG join, dissenting.

The Court took this case to determine whether a vacatur is a "fact," as that term is used in 28 U. S. C. § 2255, ¶ 6(4), thus commencing the statute's 1-year limitations period. The question divides the Courts of Appeals. Today the Court holds that the order of vacatur is the fact that begins the limitations period. On that point, I agree. Surprisingly, however, the Court proceeds to announce a second requirement of its own design: In order to obtain relief under § 2255, ¶ 6(4), petitioner must show he used due diligence in seeking the vacatur itself. On this point, I disagree.

In my view the Court's new rule of prevacatur diligence is inconsistent with the statutory language; is unnecessary since States are quite capable of protecting themselves against undue delay in commencing state proceedings to vacate prior judgments; introduces an imprecise and incongruous deadline into the federal criminal process; is of sufficient uncertainty that it will require further litigation before its operation is understood; and, last but not least, drains scarce defense resources away from the prisoner's federal criminal case in some of its most critical stages. For these reasons, I submit my respectful dissent.

## I

The question on which we granted certiorari is this: "When a federal court bases an enhanced sentence on a vacated state conviction, is the vacatur of the state conviction a 'fact' supporting a prisoner's 28 U. S. C. § 2255 claim requiring reduction of the prisoner's sentence?" Pet. for Cert. i. In a change from the position it took in the Court of Appeals, the Government in its brief to this Court and again at oral argument all but conceded that the vacatur is a fact supporting a claim. See Brief for United States 33; Tr. of Oral Arg. 13. Seeking a new rationale to imprison petitioner for an

additional eight years on the basis of a prior Georgia conviction all of us know to be void, the Government defends the Court of Appeals' judgment on an alternative ground: Federal law requires diligence on the part of the defendant not only in bringing the vacatur to the attention of the federal court but also in commencing state proceedings to obtain the vacatur in the first place. According to the Government, petitioner's diligence should be measured from the time a petitioner could have obtained a vacatur, *i. e.*, as soon as the legal basis for vacatur existed. See Brief for United States 32–34. Although the Court adopts the Government's argument in part, it comes up with a date of its own choosing from which to measure a petitioner's diligence.

The Court is quite correct, in my view, to hold that the state-court order of vacatur itself is the critical fact which begins the Antiterrorism and Effective Death Penalty Act of 1996's 1-year limitations period. §101, 110 Stat. 1217. *Ante*, at 309. It is an accepted use of the law's vocabulary to say that the entry or the setting aside of a judgment is a fact. *Ante*, at 307. An order vacating a judgment is a definite and significant fact of litigation history. So the Court is on firm ground to say a state judgment of vacatur begins the 1-year limitations period. Even aside from the textual support for petitioner's position, our opinions in *Custis* v. *United States*, 511 U. S. 485 (1994), and *Daniels* v. *United States*, 532 U. S. 374 (2001), were decided on the understanding that Congress did not expect federal sentences to be enhanced irrespective of the validity of the state conviction relied upon for the enhancement. *Ante*, at 305–306. Those cases suggest that the proper procedure for reducing a federal sentence enhanced on the basis of an invalid state conviction is to seek a vacatur of a state conviction, and then proceed through federal habeas.

The Court is correct, too, to say that the whole problem of vacating state-court judgments fits rather awkwardly into the language of §2255, ¶6(4). *Ante*, at 308. That is be-

cause ¶ 6(4) is designed to address myriad claims, including post-trial factual discoveries such as violations of *Brady* v. *Maryland*, 373 U. S. 83 (1963), witness recantations, new exculpatory evidence, and the like. Having gone this far, the Court in my view should simply accept that § 2255, ¶ 6(4), is not a particularly good fit with the vacatur problem.

The Court, however, does not accept the consequence of its own correct determination. Instead it finds a need to make the words "discovery" and "due diligence" more applicable to the instance of vacatur. Hence it adopts the second requirement: "[W]e also hold that the statute allows the fact of the state-court order to set the 1-year period running only if the petitioner has shown due diligence in seeking the order." *Ante*, at 302. This added condition cannot be found in the statute's design or in its text. It creates, furthermore, its own set of problems. Section 2255, ¶ 6(4), neither requires nor accommodates the Court's federal rule of diligence respecting state-court proceedings.

## II

The 1-year period begins from "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 28 U. S. C. § 2255, ¶ 6(4). As the Court agrees that vacatur is the fact which begins the 1-year period, it would seem to follow that the diligence requirement pertains to presenting the fact of vacatur to the federal court. A petitioner cannot discover the vacatur until it issues. If the State has allowed the vacatur subject to its own rules respecting timely motions or applications and if petitioner has acted diligently in discovering entry of that vacatur, the proper conclusion is that he may bring a § 2255 petition within one year of obtaining the vacatur, or one year of reasonably discovering it.

The only way the majority's construction can fit the statute is if the controlling fact is the circumstance giving rise to the vacatur, not the vacatur itself. Yet the majority re-

sists that proposition, for it measures the 1-year period from the date the vacatur is ordered. *Ante*, at 309.

The majority rejects petitioner's proposed construction of the "discovered through the exercise of due diligence" language, which I would adopt, for two reasons. First, the Court observes it is "strange to say that an order vacating a conviction has been 'discovered,' . . . and stranger still to speak about the date on which it could have been discovered with due diligence, when the fact happens to be the outcome of a proceeding in which the § 2255 petitioner was the moving party." *Ante*, at 307. By bringing vacatur proceedings, petitioner himself causes the factual event to occur, and his discovery of it is "virtually guaranteed." *Ibid.* The Court is concerned that the due diligence language does barely any work under petitioner's interpretation because the language is too easily satisfied.

Though I agree it is a bit awkward, in my view it is well within the realm of reasonable statutory construction to apply the term "discover" to an order vacating a conviction. The ordinary meaning of the term "discovery," after all, is "the act, process, or an instance of gaining knowledge of or ascertaining the existence of something previously unknown or unrecognized." Webster's Third New International Dictionary 647 (1993). See also Black's Law Dictionary 465 (6th ed. 1990) ("[t]o get first sight or knowledge of"). There may be instances when there is a mistake in recording or entering the vacatur, or when it is not clear that the order in fact includes that relief, or when a prisoner's transfer or extradition reasonably causes the prisoner to learn of the order in some uncommon way. In these instances, admittedly infrequent, the word "discover" makes perfect sense. True, the due diligence language does not do much work when a petitioner receives prompt notice in the ordinary course. As explained, however, § 2255, ¶ 6(4), is designed to cover various circumstances, and many other types of claims. *Ante*, at 310.

To bolster its prevacatur diligence requirement, the Court elects to resolve a case not before it, *i. e.*, a hypothetical involving DNA testing. *Ibid.* Quite apart from the impropriety of deciding an important question not remotely presented in the case, the Court's resolution of its hypothetical is, in my view, far from self-evident. It has little to do, moreover, with the question of vacatur of a state-court judgment. We have a special obligation to the federal system to respect state-court judgments. Rather than imposing a federal rule of diligence on top of existing state-court rules for determining when a vacatur motion should be made, I would treat the critical fact as the date on which the state court orders vacatur. That, after all, is the time when the grounds for the claim to be made in federal court (the claim that an enhancement was improper) have become established under conventional principles commanding respect for state judgments, or allowing them to be set aside.

The second reason the majority rejects Johnson's position is because it is troubled by the prospect that a petitioner "might wait a long time before raising any question about a predicate conviction . . . ." *Ante*, at 307. Even if this concern were a sufficient basis for adding the majority's prevacatur diligence requirement to the statute and creating a two-tier diligence structure, the concern is overstated. In most instances, States can, and do, impose diligence by limiting the time for requesting a vacatur of a prior state conviction. It was represented at oral argument that all but about six States impose a limitation by statute or laches. Tr. of Oral Arg. 10. Even in those six States, furthermore, it is not clear that equitable defenses would not apply. *Id.*, at 17–18.

Any States that do not impose time limitations are free to do so if deemed necessary to protect the integrity of their own judgments, so a federal time limit is not required. This is illustrated by the instant case. When Johnson sought state relief, Georgia imposed no limitation on a petitioner's

ability to obtain a vacatur. *Ante*, at 306, n. 5. Since then, however, Georgia has enacted a 4-year limitations period for proceeding to obtain a vacatur. The majority's apparent concern that, absent its interpretation of § 2255, ¶ 6(4), petitioners have some incentive to delay proceedings to vacate a conviction seems quite unfounded.

The majority's construction, furthermore, can allow for the same delay it seeks to avoid. After all, the Court holds that the due diligence requirement is triggered only by a federal judgment. Consider a simple hypothetical. Suppose that a petitioner suffers a state conviction in 1980, and, despite learning in 1985 that his conviction is constitutionally infirm, does nothing. Suppose further he is sentenced for a federal crime in 2000. Under the majority's view, the petitioner's obligation to question his state conviction is not triggered until 2000, a full 15 years after he knew the basis for vacatur. Despite the adaptation it makes to § 2255, ¶ 6(4), the majority has failed to create an incentive for petitioner to act promptly in instituting state proceedings. The incentive exists under state law, and the Court does not need to supplement it.

The error of the majority's position is further revealed by its selection of what I consider to be an incorrect date for triggering the prevacatur diligence requirement. It holds that the triggering event is set at the date of petitioner's federal judgment. *Ante*, at 310 (setting November 29, 1994, the date of judgment, as the date triggering the diligence requirement).

This rule of the Court's own contrivance is adopted, in my respectful submission, without full appreciation for the dynamic of the criminal process and its demands on counsel. Assuming for the moment that some event in the federal court should start the time period for pursuing state relief, surely the entry of judgment is ill chosen. This means the judgment is a mandatory beginning point for collateral proceedings to correct a judgment and sentence not yet final.

If the Court wants to invent its own rule and use an event in the federal criminal proceeding to commence a limitations period (and I disagree with both propositions), the date the judgment becomes final, not the date of judgment in the trial court, is the proper point of beginning.

The law, and the decisions of this Court, put extraordinary demands on defense counsel. Immediately after a judgment, defense counsel must concentrate on ensuring that evidence of trial misconduct does not disappear and that grounds for appeal are preserved and presented. Today the Court says defense counsel must divert scarce resources from these heavy responsibilities to commence collateral proceedings to attack state convictions.

In this case seven different convictions in Georgia may have been relevant. In other cases convictions that might enhance have been entered in different States. See, *e. g.*, *Custis*, 511 U. S., at 487. It is most troubling for a Court that insists on high standards of performance for defense counsel now to instruct that collateral proceedings must be commenced in one or more States during the critical time immediately after judgment and before appeal.

If the Court is to insist upon its own second tier of diligence, the dynamics of the criminal system and ordinary rules for determining when collateral proceedings become necessary should instruct us that, for federal purposes, this tier begins when the federal conviction becomes final. This also ensures that the federal court does not make demands on counsel and on state courts that are pointless if the federal conviction is overturned. Perhaps the Court rejects the date of final judgment as triggering its requirement because it adds little to the state requirements of diligence. If this surmise is correct, of course, it demonstrates that the Court should not adopt its interpretation in the first place.

Aside from diverting resources from a petitioner's federal case, the majority's approach creates new uncertainty, giving rise to future litigation. It leaves unsaid what standard will

be used for measuring whether a petitioner acted promptly, forcing litigants and lawyers to scramble to state court in the hopes they satisfy the Court's vague prevacatur diligence requirement. The Court tells us nothing about what to make of existing state standards regarding diligence. Assume a State has a 4-year limitations period for bringing a vacatur action and a petitioner acts within two years of his state conviction. Do we look to state law as a benchmark for what should be presumed to be diligent? The murkiness of the Court's new rule will set in motion satellite litigation on this and related points.

In lieu of adopting an interpretation that creates more problems than it avoids, I would hold that the order vacating a prior state conviction is the fact supporting a § 2255 claim, and the statute is satisfied if the § 2255 proceeding is commenced within one year of its entry, unless the petitioner shows it was not reasonably discovered until later in which case that date will control when the statute begins to run. For these reasons, I would reverse the judgment of the Court of Appeals.

Syllabus

# ROUSEY ET UX. *v.* JACOWAY

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 03–1407. Argued December 1, 2004—Decided April 4, 2005

Several years after petitioners deposited distributions from their pension plans into Individual Retirement Accounts (IRAs), they filed a joint petition under Chapter 7 of the Bankruptcy Code. They sought to shield portions of their IRAs from their creditors by claiming them as exempt from the bankruptcy estate under 11 U. S. C. § 522(d)(10)(E), which provides, *inter alia*, that a debtor may withdraw from the estate his "right to receive . . . a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of . . . age." Respondent Jacoway, the Bankruptcy Trustee, objected to the Rouseys' exemption and moved for turnover of the IRAs to her. The Bankruptcy Court sustained her objection and granted her motion, and the Bankruptcy Appellate Panel agreed. The Eighth Circuit affirmed, concluding that, even if the Rouseys' IRAs were "similar plans or contracts" to the plans specified in § 522(d)(10)(E), their IRAs gave them no right to receive payment "on account of age," but were instead savings accounts readily accessible at any time for any purpose.

*Held:* The Rouseys can exempt IRA assets from the bankruptcy estate because the IRAs fulfill both of the § 522(d)(10)(E) requirements at issue here—they confer a right to receive payment on account of age and they are similar plans or contracts to those enumerated in § 522(d)(10)(E). Pp. 325–335.

(a) The Court reaffirms its suggestion in *Patterson* v. *Shumate*, 504 U. S. 753, 762–763, that IRAs like the Rouseys' can be exempted from the bankruptcy estate pursuant to § 522(d)(10)(E). Pp. 325–326.

(b) The Rouseys' IRAs provide a right to payment "on account of . . . age" within § 522(d)(10)(E)'s meaning. The quoted phrase requires that the right to receive payment be "because of" age. *Bank of America Nat. Trust and Sav. Assn.* v. *203 North LaSalle Street Partnership*, 526 U. S. 434, 450–451. This meaning comports with the common, dictionary understanding of "on account of," and § 522(d)(10)(E)'s context does not suggest another meaning. The statutes governing IRAs persuade the Court that Jacoway is mistaken in arguing that there is no causal connection between that right and age or any other factor because the Rouseys' IRAs provide a right to payment on demand. Their right to receive payment of the entire balance is not in dispute. Because their accounts qualify as IRAs under 26 U. S. C. § 408(a), they have a nonfor-

feitable right to the balance held in those accounts, § 408(a)(4). That right is restricted by a 10-percent tax penalty on any withdrawal made before age 59½, § 72(t). Contrary to Jacoway's contention, this 10-percent penalty is substantial. It applies proportionally to any amounts withdrawn and prevents access to the 10 percent that the Rouseys would forfeit should they withdraw early. It therefore effectively prevents access to the entire balance in their IRAs and limits their right to "payment" of the balance. And because this condition is removed when the accountholder turns age 59½, the Rouseys' right to the balance of their IRAs is a right to payment "on account of" age. Pp. 326–329.

(c) The Rouseys' IRAs are "similar plan[s] or contract[s]" to the "stock bonus, pension, profitsharing, [or] annuity . . . plan[s]" listed in § 522(d)(10)(E). To be "similar," an IRA must be like, though not identical to, the listed plans or contracts, and consequently must share characteristics common to them. Because the Bankruptcy Code does not define the listed plans, the Court looks to their ordinary meaning. *E. g., United States* v. *LaBonte*, 520 U. S. 751, 757. Dictionary definitions reveal that, although the listed plans are dissimilar to each other in some respects, their common feature is that they provide income that substitutes for wages earned as salary or hourly compensation. That the income the Rouseys will derive from their IRAs is likewise income that substitutes for wages lost upon retirement is demonstrated by the facts that (1) regulations require distribution to begin no later than the calendar year after the year the accountholder turns 70½; (2) taxation of IRA money is deferred until the year in which it is distributed; (3) withdrawals before age 59½ are subject to the 10-percent penalty; and (4) failure to take the requisite minimum distributions results in a 50-percent tax penalty on funds improperly remaining in the account. The Court rejects Jacoway's argument that IRAs cannot be similar plans or contracts because the Rouseys have complete access to them. This argument is premised on her view that the 10-percent penalty is modest, a premise with which the Court does not agree. The Court also rejects Jacoway's contention that the availability of IRA withdrawals exempt from the early withdrawal penalty renders the Rouseys' IRAs more like savings accounts. Sections 522(d)(10)(E)(i) through (iii)—which preclude the debtor from using the § 522(d)(10)(E) exemption if an insider established his plan or contract; the right to receive payment is on account of age or length of service; and the plan does not qualify under specified Internal Revenue Code sections, including the section governing IRAs—not only suggest generally that the Rouseys' IRAs are exempt, but also support the Court's conclusion that they are "similar plan[s] or contract[s]" under § 522(d)(10)(E). Pp. 329–335.

347 F. 3d 689, reversed and remanded.

THOMAS, J., delivered the opinion for a unanimous Court.

*Pamela S. Karlan* argued the cause for petitioners. With her on the briefs were *Thomas C. Goldstein, Amy Howe, Claude R. Jones,* and *G. Eric Brunstad, Jr.*

*Colli C. McKiever* argued the cause for respondent. With her on the brief were *Jill R. Jacoway, pro se, Seth P. Waxman, Craig Goldblatt,* and *Jorian Rose.**

JUSTICE THOMAS delivered the opinion of the Court.

The Bankruptcy Code permits debtors to exempt certain property from the bankruptcy estate, allowing them to retain those assets rather than divide them among their creditors. 11 U. S. C. § 522. The question in this case is whether debtors can exempt assets in their Individual Retirement Accounts (IRAs) from the bankruptcy estate pursuant to § 522(d)(10)(E). We hold that IRAs can be so exempted.

I

Petitioners Richard and Betty Jo Rousey were formerly employed at Northrup Grumman Corp. At the termination of their employment, Northrup Grumman required them to take lump-sum distributions from their employer-sponsored pension plans. *In re Rousey,* 283 B. R. 265, 268 (Bkrtcy. App. Panel CA8 2002); Brief for Petitioners 2. The Rouseys deposited the lump sums into two IRAs, one in each of their names. 283 B. R., at 268.

The Rouseys' accounts qualify as IRAs under a number of requirements imposed by the Internal Revenue Code. Each account is "a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries." 26 U. S. C. § 408(a) (2000 ed. and Supp. II). The In-

**Patricia J. Kaeding, Brady C. Williamson, Elizabeth Warren, Jean Constantine-Davis, Nina F. Simon,* and *Michael R. Schuster* filed a brief for AARP as *amicus curiae* urging reversal.

ternal Revenue Code limits the types of assets in which IRA-holders may invest their accounts, §§ 408(a)(3), (a)(5), and provides that the balance in IRAs is nonforfeitable, § 408(a)(4). It also caps yearly contributions to IRAs. § 408(*o*)(2). Withdrawals made before the accountholder turns 59½ are, with limited exceptions, subject to a 10-percent tax penalty. § 72(t).

IRA contributions receive favorable tax treatment. In particular, the Internal Revenue Code generally defers taxation of the money placed in IRAs and the income earned from those sums until the assets are withdrawn. See § 219(a) (contributions to IRAs are tax deductible); § 408(e)(1) (IRA is tax exempt). Moreover, within a certain timeframe accountholders can, as the Rouseys did here, roll over distributions received from other retirement plans. § 408(a)(1). The Internal Revenue Code encourages such rollovers by making them nontaxable. §§ 408(d)(3), 402(c)(1), 403(b)(8), and 457(e)(16).

The Rouseys' IRA agreements, as well as relevant regulations, provide that their "entire interest in the custodial account must be, or begin to be, distributed by" April 1 following the calendar yearend in which they reach age 70½. *In re Rousey*, 275 B. R. 307, 310 (Bkrtcy. Ct. WD Ark. 2002). The IRA agreements permit withdrawal prior to age 59½, but note the federal tax penalties applicable to such distributions. *Id.*, at 311.

Several years after establishing their IRAs, the Rouseys filed a joint Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Western District of Arkansas. In the schedules and statements accompanying their petition, the Rouseys sought to shield portions of their IRAs from their creditors by claiming them as exempt from the bankruptcy estate pursuant to 11 U. S. C. § 522(d)(10)(E). This exemption provides that a debtor may withdraw from the bankruptcy estate his "right to receive—

. . . . .

> "(E) a payment under a stock bonus, pension, profit-sharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor . . . ."

The Bankruptcy Court appointed respondent Jill R. Jacoway as the Chapter 7 Trustee. As Trustee, Jacoway is responsible for overseeing the liquidation of the bankruptcy estate and the distribution of the proceeds. She objected to the Rouseys' claim for the exemption of their IRAs and moved for turnover of those sums to her. The Bankruptcy Court sustained Jacoway's objection and granted her motion. 275 B. R., at 309.

The Rouseys appealed. The Bankruptcy Appellate Panel (BAP) agreed with the Bankruptcy Court that the Rouseys could not exempt their IRAs under § 522(d)(10)(E). It concluded that the IRAs were not "'similar plan[s] or contract[s]'" to stock bonus, pension, profitsharing, or annuity plans, because, by contrast to the limited access permitted in such plans, the Rouseys had "unlimited access" to the funds held in their IRAs. 283 B. R., at 272. That access also meant, the BAP reasoned, that the Rouseys had complete control over the funds in their IRAs, "subject only to a ten percent tax penalty." *Id.*, at 273. Because they had such control, the payments from the IRAs were not "on account of any factor listed in 11 U. S. C. § 522(d)(10)(E)." *Ibid.*

The Rouseys again appealed, and the Court of Appeals for the Eighth Circuit affirmed. The Court of Appeals concluded that, even if the Rouseys' IRAs were "'similar plans or contracts'" to stock bonus, pension, profitsharing, or annuity plans, their IRAs gave them no right to receive payment "'on account of age.'" *In re Rousey*, 347 F. 3d 689, 693 (2003). Like the BAP, the Court of Appeals reasoned that

the Rouseys' right to payment was conditioned neither on age nor on any of the other statutory factors. Their IRAs were instead "readily accessible savings accounts of which the debtors may easily avail themselves (albeit with some discouraging tax consequences) at any time for any purpose." *Ibid.* The Court of Appeals recognized that several of its sister Circuits had reached a contrary result. *Ibid.* See *In re Brucher*, 243 F. 3d 242, 243–244 (CA6 2001); *In re McKown*, 203 F. 3d 1188, 1190 (CA9 2000); *In re Dubroff*, 119 F. 3d 75, 78 (CA2 1997); *In re Carmichael*, 100 F. 3d 375, 378 (CA5 1996).

We granted certiorari to resolve this division among the Courts of Appeals regarding whether debtors can exempt IRAs from the bankruptcy estate under 11 U. S. C. § 522(d)(10)(E). 541 U. S. 1085 (2004).

## II

As a general matter, upon the filing of a petition for bankruptcy, "all legal or equitable interests of the debtor in property" become the property of the bankruptcy estate and will be distributed to the debtor's creditors. § 541(a)(1). To help the debtor obtain a fresh start, the Bankruptcy Code permits him to withdraw from the estate certain interests in property, such as his car or home, up to certain values. See, *e. g.*, § 522(d); *United States* v. *Security Industrial Bank*, 459 U. S. 70, 72, n. 1 (1982). In this case, the Rouseys claimed their IRAs as exempt under § 522(d)(10)(E). Under the terms of the statute, see *supra*, at 323–324, the Rouseys' right to receive payment under their IRAs must meet three requirements to be exempted under this provision: (1) The right to receive payment must be from "a stock bonus, pension, profitsharing, annuity, or similar plan or contract"; (2) the right to receive payment must be "on account of illness, disability, death, age, or length of service"; and (3) even then, the right to receive payment may be exempted only

"to the extent" that it is "reasonably necessary [to] support" the accountholder or his dependents. § 522(d)(10)(E).

The dispute in this case is whether the Rouseys' IRAs fulfill the first and second requirements. This Court implied that IRAs like the Rouseys' satisfy both elements in *Patterson* v. *Shumate*, 504 U. S. 753 (1992). There, in construing another section of the Bankruptcy Code, this Court stated that IRAs could be exempted pursuant to § 522(d)(10)(E). *Id.*, at 762–763 ("Although a debtor's interest [in an IRA] could not be excluded under § 541(c)(2) . . . , that interest nevertheless could be exempted under § 522(d)(10)(E)" (footnote omitted)). We now reaffirm that statement and conclude that IRAs can be exempted from the bankruptcy estate pursuant to § 522(d)(10)(E).

## A

We turn first to the requirement that the payment be "on account of illness, disability, death, age, or length of service." *Ibid.* We have interpreted the phrase "on account of" elsewhere within the Bankruptcy Code to mean "because of," thereby requiring a causal connection between the term that the phrase "on account of" modifies and the factor specified in the statute at issue. *Bank of America Nat. Trust and Sav. Assn.* v. *203 North LaSalle Street Partnership*, 526 U. S. 434, 450–451 (1999). In reaching that conclusion, we noted that "because of" was "certainly the usage meant for the phrase at other places in the [bankruptcy] statute," including the provision at issue here—§ 522(d)(10)(E). *Ibid.* This meaning comports with the common understanding of "on account of." See, *e. g.*, Random House Dictionary of the English Language 13 (2d ed. 1987) (listing as definitions "by reason of," "because of"); Webster's Third New International Dictionary 13 (1981) (hereinafter Webster's 3d) (same). The context of this provision does not suggest that Congress deviated from the term's ordinary meaning. Thus, "on account of" in § 522(d)(10)(E) requires that the right to receive

payment be "because of" illness, disability, death, age, or length of service.

Jacoway argues that the Rouseys' right to receive payment from their IRAs is not "because of" these listed factors. In particular, she asserts that the Rouseys can withdraw funds from their IRAs for any reason at all, so long as they are willing to pay a 10-percent penalty. Thus, Jacoway maintains that there is no causal connection between the Rouseys' right to payment and age (or any other factor), because their IRAs provide a right to payment on demand.

We disagree. The statutes governing IRAs persuade us that the Rouseys' right to payment from IRAs is causally connected to their age. Their right to receive payment of the entire balance is not in dispute. Because their accounts qualify as IRAs under 26 U. S. C. § 408(a) (2000 ed. and Supp. II), the Rouseys have a nonforfeitable right to the balance held in those accounts, § 408(a)(4). That right is restricted by a 10-percent tax penalty that applies to withdrawals from IRAs made before the accountholder turns 59½. Contrary to Jacoway's contention, this tax penalty is substantial. The deterrent to early withdrawal it creates suggests that Congress designed it to preclude early access to IRAs. The low rates of early withdrawals are consistent with the notion that this penalty substantially deters early withdrawals from such accounts.[1] Because the 10-percent penalty applies pro-

[1] See Amromin & Smith, What Explains Early Withdrawals from Retirement Accounts? Evidence From a Panel of Taxpayers, 56 Nat. Tax J. 595, 602 (Sept. 2003) (Table 1) (3.4 percent of IRA-holders took penalized withdrawals in 1996); *In re Cilek*, 115 B. R. 974, 988, n. 15 (Bkrtcy. Ct. WD Wis. 1990) ("[O]f the $6,457,306,674 deposited in IRAs in the nation's credit unions, only 1.2% was withdrawn early and suffered a tax penalty during 1987, and only 1.27% was withdrawn during 1988"); see also Sabelhaus, Projecting IRA Balances and Withdrawals, 20 Employee Benefit Research Institute Notes 1, 3 (May 1999) (finding that "[t]he pattern in both [1993 and 1996] suggests infrequent withdrawals from IRAs" by those under 59½ and noting the consistency of this pattern with the view that the penalty "has a big impact on withdrawal behavior").

portionally to any amounts withdrawn, it prevents access to the 10 percent that the Rouseys would forfeit should they withdraw early, and thus it effectively prevents access to the entire balance in their IRAs.[2] It therefore limits the Rouseys' right to "payment" of the balance of their IRAs. And because this condition is removed when the accountholder turns age 59½, the Rouseys' right to the balance of their IRAs is a right to payment "on account of" age.[3] The Rouseys no more have an unrestricted right to payment of the balance in their IRAs than a contracting party has an unrestricted right to breach a contract simply because the price of doing so is the payment of damages.[4] Accordingly,

[2] We need not and do not reach the question whether penalties of less than 10 percent or of a fixed amount would also be a sufficient barrier to early withdrawal.

[3] The Rouseys are entitled to penalty-free distributions because of factors apart from age in certain circumstances. See 26 U. S. C. §§ 72(t)(2)(A)(ii)–(iv) (permitting penalty-free distributions due to the death of or disability of the IRA-holder, or as substantially equal periodic payments for the life expectancy of the accountholder); § 72(t)(2)(B) (medical expenses); §§ 72(t)(2)(D)–(F) (health insurance premiums, certain higher education expenses, and first-time home purchase). But these circumstances are confined to specific and narrow uses. See *infra*, at 332–334. Thus, that there are other circumstances in which the Rouseys can receive payment does not change our conclusion that they have a right to payment on account of age, for these exceptions do not undermine the fact that they cannot obtain unrestricted use of their funds until age 59½. Moreover, § 522(d)(10)(E) requires that the right to payment be on account of age—not that it be solely on account of this factor.

[4] *O'Gilvie* v. *United States*, 519 U. S. 79 (1996), and *Commissioner* v. *Schleier*, 515 U. S. 323 (1995), upon which Jacoway relies, Brief for Respondent 17–19, are consistent with our conclusion that petitioners' IRAs satisfy the statute's "on account of" requirement. Those cases involved the meaning of the phrase "on account of" in a tax provision that permitted the exclusion from income of damages received "'on account' of personal injuries." *O'Gilvie*, *supra*, at 81 (emphasis deleted); *Schleier*, *supra*, at 329. In both cases, we rejected the claim that damages that were punitive in nature were on account of personal injuries, since such damages did not compensate for the personal injuries. *O'Gilvie*, *supra*, at 83–84; *Schleier*, *supra*, at 331–332. In so holding in *O'Gilvie*, we ex-

we conclude that the Rouseys' IRAs provide a right to payment on account of age.

B

In addition to requiring that the IRAs provide a right to payment "on account of" age or one of the other factors listed in the statute, 11 U. S. C. § 522(d)(10)(E) also requires the Rouseys' IRAs to be "stock bonus, pension, profitsharing, annuity, or similar plan[s] or contract[s]." No party contends that the Rouseys' IRAs are stock bonus, pension, profitsharing, or annuity plans or contracts. The issue, then, is whether the Rouseys' IRAs are "similar plan[s] or contract[s]" within the meaning of § 522(d)(10)(E). To be "similar," an IRA must be like, though not identical to, the specific plans or contracts listed in § 522(d)(10)(E), and consequently must share characteristics common to the listed plans or contracts. See American Heritage Dictionary of the English Language 1206 (1981) (hereinafter Am. Hert.); Webster's 3d 2120.

The Rouseys contend that IRAs are "similar" to stock bonus, pension, profitsharing, or annuity plans or contracts, in that they have the same "primary purpose," namely, "enabl[ing] Americans to save for their retirement." Reply Brief for Petitioners 13. Jacoway counters that IRAs are unlike the listed plans because those plans provide "deferred compensation," Brief for Respondent 22, whereas IRAs allow complete access to deposited funds and are therefore not deferred at all, *id.*, at 22–24. We agree with the Rouseys that IRAs are similar to the plans specified in the statute. Those plans, like the Rouseys' IRAs, provide a substitute for wages (by wages, for present purposes, we mean compensation earned as hourly or salary income), and are not mere savings accounts. The Rouseys' IRAs are there-

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pressly rejected a "but for" causation reading of the statute. See 519 U. S., at 82–83. We instead concluded, as we have here, that the phrase "on account of" means "'by reason of[, or] because of.'" *Id.*, at 83.

fore "similar plan[s] or contract[s]" within the meaning of § 522(d)(10)(E).

We turn first to the characteristics the specific plans and contracts listed in § 522(d)(10)(E) share. The Bankruptcy Code does not define the terms "profitsharing," "stock bonus," "pension," or "annuity." Accordingly, we look to the ordinary meaning of these terms. *United States* v. *LaBonte*, 520 U. S. 751, 757 (1997); *Perrin* v. *United States*, 444 U. S. 37, 42 (1979). A "profitsharing" plan, of course, is "[a] system by which employees receive a share of the profits of a business enterprise." Am. Hert. 1045.[5] Profitsharing plans may provide deferred compensation, but they may also be "cash plans" in which a predetermined percentage of the profits is distributed to employees at set intervals. J. Langbein & B. Wolk, Pension and Employee Benefit Law 48 (3d ed. 2000). A stock bonus plan is like a profitsharing plan, except that it distributes company stock rather than cash from profits. *Id.*, at 49.[6] A pension is defined as "a fixed sum . . . paid under given conditions to a person following his retirement from service (as due to age or disability) or to the surviving dependents of a person entitled to such a pension." Webster's 3d 1671.[7] Finally, an annuity is "an amount payable yearly or at other regular intervals . . . for a certain or uncertain period (as for years, for life, or in perpetuity)." *Id.*, at 88.[8]

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[5] See also 12 Oxford English Dictionary 580 (2d ed. 1989) (OED) ("[T]he sharing of profits, *spec.* between employer and employed"); Webster's 3d 1811 ("[A] system or process under which employees receive a part of the profits of an industrial or commercial enterprise").

[6] See also *id.*, at 2247 (defining "stock bonus" as "a bonus paid to corporation executives and employees in shares of stock").

[7] See also Am. Hert. 970 ("sum of money paid regularly as a retirement benefit or by way of patronage").

[8] See also *id.*, at 54 ("[T]he annual payment of an allowance or income"; "[t]he interest or dividends paid annually on an investment of money"); 1 OED 488 ("[a] yearly grant, allowance, or income," or "[a]n investment of money, whereby the investor becomes entitled to receive a series of equal

The common feature of all of these plans is that they provide income that substitutes for wages earned as salary or hourly compensation. This understanding of the plans' similarities comports with the other types of payments that a debtor may exempt under § 522(d)(10)—all of which concern income that substitutes for wages. See, *e. g.*, § 522(d)(10)(A) ("social security benefit, unemployment compensation, or a local public assistance benefit"); § 522(d)(10)(B) ("a veterans' benefit"); § 522(d)(10)(C) ("disability, illness, or unemployment benefit"); § 522(d)(10)(D) ("alimony, support, or separate maintenance"). But the plans are dissimilar in other respects: Employers establish and contribute to stock bonus, profitsharing, and pension plans or contracts, whereas an individual can establish and contribute to an annuity on terms and conditions he selects. Moreover, pension plans and annuities provide deferred payment, whereas profitsharing or stock bonus plans may or may not provide deferred payment. And while a pension provides retirement income, none of these other plans necessarily provides retirement income. What all of these plans have in common is that they provide income that substitutes for wages.

Several considerations convince us that the income the Rouseys will derive from their IRAs is likewise income that substitutes for wages. First, the minimum distribution requirements, as discussed above, require distribution to begin at the latest in the calendar year after the year in which the accountholder turns 70½. Thus, accountholders must begin to withdraw funds when they are likely to be retired and lack wage income. Second, the Internal Revenue Code defers taxation of money held in accounts qualifying as IRAs under 26 U. S. C. § 408(a) (2000 ed. and Supp. II) until the year in which it is distributed, treating it as income only in such years. §§ 219, 408(e) (2000 ed. and Supp. II). This tax treatment further encourages accountholders to wait until

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annual payments, which, except in the case of perpetual annuities, includes the ultimate return of both principal and interest").

retirement to withdraw the funds: The later withdrawal occurs, the longer the taxes on the amounts are deferred. Third, absent the applicability of other exceptions discussed above, withdrawals before age 59½ are subject to a tax penalty, restricting preretirement access to the funds. Finally, to ensure that the beneficiary uses the IRA in his retirement years, an accountholder's failure to take the requisite minimum distributions results in a 50-percent tax penalty on funds improperly remaining in the account. § 4974(a). All of these features show that IRA income substitutes for wages lost upon retirement and distinguish IRAs from typical savings accounts.

We find unpersuasive Jacoway's contention that the IRAs cannot be similar plans or contracts because the Rouseys have complete access to them. At bottom, this contention rests, as did her "on account of" argument, on the premise that the tax penalty imposed for early withdrawal is modest and hence not a true limit on the withdrawal of funds. As explained above, however, that penalty erects a substantial barrier to early withdrawal. *Supra*, at 327–328. Funds in a typical savings account, by contrast, can be withdrawn without age-based penalty.

We also reject Jacoway's argument that the availability of IRA withdrawals exempt from the 10-percent penalty renders the Rouseys' IRAs more like savings accounts. While Jacoway is correct that the Internal Revenue Code permits penalty-free early withdrawals in certain limited circumstances, 26 U. S. C. § 72(t)(2), these exceptions do not reduce the IRAs to savings accounts.

The exceptions are narrow. For example, penalty-free early distributions for health insurance premiums are limited to unemployed individuals who have received unemployment compensation for at least 12 consecutive weeks and have taken those distributions during the same year in which the unemployment compensation is made. § 72(t)(2)(D). These payments are further limited to the actual amount paid for

insurance for the accountholder, his spouse, and his dependents. § 72(t)(2)(D)(iii). The Internal Revenue Code likewise caps the amount of, and sets qualifications for, both the higher education expenses and first-time home purchases for which penalty-free early distributions can be taken. §§ 72(t)(2)(E), 72(t)(7) (higher education expenses); §§ 72(t)(2)(F), 72(t)(8) (home purchases). The Internal Revenue Code also permits penalty-free distributions to a beneficiary on the death of the accountholder or in the event that the accountholder becomes disabled. §§ 72(t)(2)(A)(ii)–(iii).[9]

These exceptions are limited in amount and scope. Even with these carveouts, an early withdrawal without penalty remains the exception, rather than the rule. And as we explained in discussing the "on account of" requirement, withdrawals from other retirement plans receive similar tax treatment.

Our conclusion that the Rouseys' IRAs can be exempt under 11 U. S. C. § 522(d)(10)(E) finds support in clauses (i)–(iii) of § 522(d)(10)(E). These clauses bring into the estate certain rights to payment that otherwise would be exempt under § 522(d)(10)(E). They provide that a right to receive payment cannot be exempt if:

> "(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at

[9] The statute also permits penalty-free early withdrawal in the form of substantially equal periodic payments made for the life expectancy of the accountholder. 26 U. S. C. § 72(t)(2)(iv). This exception is likewise limited. If these payments are modified before the accountholder turns 59½ or within five years of the start of those payments, the accountholder must pay not only the taxes that would have been imposed on those previous payments, including the 10-percent penalty, but also interest for the period in which the tax payment was deferred. § 72(q)(3). As a result, if an accountholder uses this exception, he must use only this form of early withdrawal, lest he pay the penalty, taxes, and interest. The statute permits penalty-free withdrawals for medical expenses, which is likewise limited. § 72(t)(2)(B). The amount that can be withdrawn is capped by the amount that can be deducted in a given year. *Ibid.*

> the time the debtor's rights under such plan or contract arose;
>
> "(ii) such payment is on account of age or length of service; and
>
> "(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b) or 408 of the Internal Revenue Code of 1986."

Thus, clauses (i)–(iii) preclude the debtor from using this exemption if an insider established his plan or contract; the right to receive payment is on account of age or length of service; and the plan does not qualify under the specified Internal Revenue Code sections, including the section that governs IRAs, 26 U. S. C. § 408 (2000 ed. and Supp. II).

As a general matter, it makes little sense to exclude from the exemption plans that fail to qualify under § 408, unless all plans that do qualify under § 408, including IRAs, are generally within the exemption. If IRAs were not within 11 U. S. C. § 522(d)(10)(E), Congress would not have referred to them in its exception. *McKown*, 203 F. 3d, at 1190. More specifically, clause (iii) suggests that plans qualifying under 26 U. S. C. § 408 (2000 ed. and Supp. II), including IRAs, are similar plans or contracts. The other sections of the Internal Revenue Code cited in clause (iii)—§§ 401(a), 403(a), and 403(b)—all establish requirements for tax-qualified retirement plans that take the form of, among other things, annuities, profitsharing plans, and stock bonus plans. By grouping § 408 with these other plans that are of the specific types listed in subparagraph (E), clause (iii) suggests that IRAs are similar to them. Thus, the text of these clauses not only suggests generally that the Rouseys' IRAs are exempt, but also supports our conclusion that they are "similar plan[s] or contract[s]" under 11 U. S. C. § 522(d)(10)(E).

* * *

In sum, the Rouseys' IRAs fulfill both of § 522(d)(10)(E)'s requirements at issue here—they confer a right to receive

payment on account of age, and they are similar plans or contracts to those enumerated in § 522(d)(10)(E). The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

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# DURA PHARMACEUTICALS, INC., ET AL. *v.* BROUDO ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 03-932. Argued January 12, 2005—Decided April 19, 2005

Respondents filed a securities fraud class action, alleging that petitioners, Dura Pharmaceuticals, Inc., and some of its managers and directors (hereinafter Dura), made, *inter alia*, misrepresentations about future Food and Drug Administration approval of a new asthmatic spray device, leading respondents to purchase Dura securities at an artificially inflated price. In dismissing, the District Court found that the complaint failed adequately to allege "loss causation"—*i. e.*, a causal connection between the spray device misrepresentation and the economic loss, 15 U. S. C. § 78u–4(b)(4). The Ninth Circuit reversed, finding that a plaintiff can satisfy the loss causation requirement simply by alleging that a security's price at the time of purchase was inflated because of the misrepresentation.

*Held:*

1. An inflated purchase price will not by itself constitute or proximately cause the relevant economic loss needed to allege and prove "loss causation." The basic elements of a private securities fraud action—which resembles a common-law tort action for deceit and misrepresentation—include, as relevant here, economic loss and "loss causation." The Ninth Circuit erred in following an inflated purchase price approach to showing causation and loss. First, as a matter of pure logic, the moment the transaction takes place, the plaintiff has suffered no loss because the inflated purchase price is offset by ownership of a share that possesses equivalent value at that instant. And the logical link between the inflated purchase price and any later economic loss is not invariably strong, since other factors may affect the price. Thus, the most logic alone permits this Court to say is that the inflated purchase price suggests that misrepresentation "touches upon" a later economic loss, as the Ninth Circuit found. However, to touch upon a loss is not to *cause* a loss, as 15 U. S. C. § 78u–4(b)(4) requires. The Ninth Circuit's holding also is not supported by precedent. The common-law deceit and misrepresentation actions that private securities fraud actions resemble require a plaintiff to show not only that had he known the truth he would not have acted, but also that he suffered actual economic loss. Nor can the holding below be reconciled with the views of other Courts

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of Appeals, which have rejected the inflated purchase price approach to showing loss causation. Finally, the Ninth Circuit's approach is inconsistent with an important securities law objective. The securities laws make clear Congress' intent to permit private securities fraud actions only where plaintiffs adequately allege and prove the traditional elements of cause and loss, but the Ninth Circuit's approach would allow recovery where a misrepresentation leads to an inflated purchase price, but does not proximately cause any economic loss. Pp. 341–346.

2. Respondents' complaint was legally insufficient in respect to its allegation of "loss causation." While Federal Rule of Civil Procedure 8(a)(2) requires only a "short and plain statement of the claim showing that the pleader is entitled to relief," and while the Court assumes that neither the Rules nor the securities statutes place any further requirement in respect to the pleading, the "short and plain statement" must give the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests," *Conley* v. *Gibson*, 355 U. S. 41, 47. The complaint here contains only respondents' allegation that their loss consisted of artificially inflated purchase prices. However, as this Court has concluded here, such a price is not itself a relevant economic loss. And the complaint nowhere else provides Dura with notice of what the relevant loss might be or of what the causal connection might be between that loss and the misrepresentation. Ordinary pleading rules are not meant to impose a great burden on a plaintiff, but it should not prove burdensome for a plaintiff suffering economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind. Allowing a plaintiff to forgo giving any indication of the economic loss and proximate cause would bring about the very sort of harm the securities statutes seek to avoid, namely, the abusive practice of filing lawsuits with only a faint hope that discovery might lead to some plausible cause of action. Pp. 346–348.

339 F. 3d 933, reversed and remanded.

BREYER, J., delivered the opinion for a unanimous Court.

*William F. Sullivan* argued the cause for petitioners. With him on the briefs were *Christopher H. McGrath* and *Tracey L. DeLange.*

*Deputy Solicitor General Hungar* argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Clement, Dan Himmelfarb, Jacob H. Stillman, Eric Summergrad,* and *Allan A. Capute.*

*Patrick J. Coughlin* argued the cause for respondents. With him on the brief were *Sanford Svetcov, Eric Alan Isaacson, Joseph D. Daley, Alan Schulman, Myron Moskovitz, Daniel S. Sommers,* and *Paul R. Hoeber.**

JUSTICE BREYER delivered the opinion of the Court.

A private plaintiff who claims securities fraud must prove that the defendant's fraud caused an economic loss. 109 Stat. 747, 15 U. S. C. § 78u–4(b)(4). We consider a Ninth Circuit holding that a plaintiff can satisfy this requirement—a requirement that courts call "loss causation"—simply by alleging in the complaint and subsequently establishing that "the price" of the security "*on the date of purchase* was inflated because of the misrepresentation." 339 F. 3d 933, 938 (2003) (internal quotation marks omitted). In our view, the Ninth Circuit is wrong, both in respect to what a plaintiff must prove and in respect to what the plaintiffs' complaint here must allege.

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*Briefs of *amici curiae* urging reversal were filed for the American Institute of Certified Public Accountants by *Lawrence S. Robbins, Kathryn S. Zecca,* and *Richard I. Miller;* for Broadcom Corp. by *Kenneth R. Heitz, David Siegel,* and *Richard H. Zelichov;* for the Chamber of Commerce of the United States by *Neil M. Gorsuch* and *Robin S. Conrad;* for Merrill Lynch & Co., Inc., by *Stephen M. Shapiro, Timothy S. Bishop, Andrew L. Frey,* and *Kenneth S. Geller;* for the Securities Industry Association et al. by *Carter G. Phillips, Richard D. Bernstein,* and *Jacqueline G. Cooper;* for Technology Network by *John R. Reese* and *Dale E. Barnes, Jr.;* and for the Washington Legal Foundation by *Michael L. Kichline, David A. Kotler, Daniel J. Popeo,* and *Paul D. Kamenar.*

Briefs of *amici curiae* urging affirmance were filed for the New Jersey Dept. of Treasury et al. by *Melvyn I. Weiss;* for the City of New York Pension Funds et al. by *Jay W. Eisenhofer, Geoffrey C. Jarvis, Leonard J. Koerner, Peter H. Mixon, David L. Muir,* and *Christopher W. Waddell;* for the National Association of Shareholder and Consumer Attorneys et al. by *Kevin P. Roddy, Deborah M. Zuckerman,* and *Michael Schuster;* for the North American Securities Administrators Association, Inc., by *Mark J. Davis;* for the Regents of the University of California by *James E. Holst* and *Christopher M. Patti;* and for James J. Hayes by *Edward M. Selfe.*

## I

Respondents are individuals who bought stock in Dura Pharmaceuticals, Inc., on the public securities market between April 15, 1997, and February 24, 1998. They have brought this securities fraud class action against Dura and some of its managers and directors (hereinafter Dura) in federal court. In respect to the question before us, their detailed amended (181 paragraph) complaint makes substantially the following allegations:

(1) Before and during the purchase period, Dura (or its officials) made false statements concerning both Dura's drug profits and future Food and Drug Administration (FDA) approval of a new asthmatic spray device. See, *e. g.*, App. 45a, 55a, 89a.

(2) In respect to drug profits, Dura falsely claimed that it expected that its drug sales would prove profitable. See, *e. g.*, *id.*, at 66a–69a.

(3) In respect to the asthmatic spray device, Dura falsely claimed that it expected the FDA would soon grant its approval. See, *e. g.*, *id.*, at 89a–90a, 103a–104a.

(4) On the last day of the purchase period, February 24, 1998, Dura announced that its earnings would be lower than expected, principally due to slow drug sales. *Id.*, at 51a.

(5) The next day Dura's shares lost almost half their value (falling from about $39 per share to about $21). *Ibid.*

(6) About eight months later (in November 1998), Dura announced that the FDA would not approve Dura's new asthmatic spray device. *Id.*, at 110a.

(7) The next day Dura's share price temporarily fell but almost fully recovered within one week. *Id.*, at 156a.

Most importantly, the complaint says the following (and nothing significantly more than the following) about

economic losses attributable to the spray device misstatement: "*In reliance on the integrity of the market, [the plaintiffs] . . . paid artificially inflated prices for Dura securities*" *and the plaintiffs suffered "damage[s]" thereby. Id.*, at 139a (emphasis added).

The District Court dismissed the complaint. In respect to the plaintiffs' drug-profitability claim, it held that the complaint failed adequately to allege an appropriate state of mind, *i. e.*, that defendants had acted knowingly, or the like. In respect to the plaintiffs' spray device claim, it held that the complaint failed adequately to allege "loss causation."

The Court of Appeals for the Ninth Circuit reversed. In the portion of the court's decision now before us—the portion that concerns the spray device claim—the Circuit held that the complaint adequately alleged "loss causation." The Circuit wrote that "plaintiffs establish loss causation if they have shown that the price *on the date of purchase* was inflated because of the misrepresentation." 339 F. 3d, at 938 (emphasis in original; internal quotation marks and citation omitted). It added that "the injury occurs at the time of the transaction." *Ibid.* Since the complaint pleaded "that the price at the time of purchase was overstated," and it sufficiently identified the cause, its allegations were legally sufficient. *Ibid.*

Because the Ninth Circuit's views about loss causation differ from those of other Circuits that have considered this issue, we granted Dura's petition for certiorari. Compare *ibid.* with, *e. g.*, *Emergent Capital Investment Management, LLC* v. *Stonepath Group, Inc.*, 343 F. 3d 189, 198 (CA2 2003); *Semerenko* v. *Cendant Corp.*, 223 F. 3d 165, 185 (CA3 2000); *Robbins* v. *Koger Properties, Inc.*, 116 F. 3d 1441, 1447–1448 (CA11 1997); cf. *Bastian* v. *Petren Resources Corp.*, 892 F. 2d 680, 685 (CA7 1990). We now reverse.

## II

Private federal securities fraud actions are based upon federal securities statutes and their implementing regulations. Section 10(b) of the Securities Exchange Act of 1934 forbids (1) the "use or employ[ment] . . . of any . . . deceptive device," (2) "in connection with the purchase or sale of any security," and (3) "in contravention of" Securities and Exchange Commission "rules and regulations." 15 U. S. C. § 78j(b). Commission Rule 10b–5 forbids, among other things, the making of any "untrue statement of a material fact" or the omission of any material fact "necessary in order to make the statements made . . . not misleading." 17 CFR § 240.10b–5 (2004).

The courts have implied from these statutes and Rule a private damages action, which resembles, but is not identical to, common-law tort actions for deceit and misrepresentation. See, *e. g.*, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 730, 744 (1975); *Ernst & Ernst* v. *Hochfelder*, 425 U. S. 185, 196 (1976). And Congress has imposed statutory requirements on that private action. *E. g.*, 15 U. S. C. § 78u–4(b)(4).

In cases involving publicly traded securities and purchases or sales in public securities markets, the action's basic elements include:

(1) *a material misrepresentation (or omission)*, see *Basic Inc.* v. *Levinson*, 485 U. S. 224, 231–232 (1988);

(2) *scienter*, *i. e.*, a wrongful state of mind, see *Ernst & Ernst*, *supra*, at 197, 199;

(3) *a connection with the purchase or sale of a security*, see *Blue Chip Stamps*, *supra*, at 730–731;

(4) *reliance*, often referred to in cases involving public securities markets (fraud-on-the-market cases) as "transaction causation," see *Basic*, *supra*, at 248–249 (nonconclusively presuming that the price of a publicly

traded share reflects a material misrepresentation and that plaintiffs have relied upon that misrepresentation as long as they would not have bought the share in its absence);

(5) *economic loss*, 15 U. S. C. § 78u–4(b)(4); and

(6) *"loss causation," i. e.*, a causal connection between the material misrepresentation and the loss, *ibid.*; cf. T. Hazen, Law of Securities Regulation §§ 12.11[1], [3] (5th ed. 2005).

Dura argues that the complaint's allegations are inadequate in respect to these last two elements.

A

We begin with the Ninth Circuit's basic reason for finding the complaint adequate, namely, that at the end of the day plaintiffs need only "establish," *i. e.*, prove, that "the price *on the date of purchase* was inflated because of the misrepresentation." 339 F. 3d, at 938 (internal quotation marks and citation omitted). In our view, this statement of the law is wrong. Normally, in cases such as this one (*i. e.*, fraud-on-the-market cases), an inflated purchase price will not itself constitute or proximately cause the relevant economic loss.

For one thing, as a matter of pure logic, at the moment the transaction takes place, the plaintiff has suffered no loss; the inflated purchase payment is offset by ownership of a share that *at that instant* possesses equivalent value. Moreover, the logical link between the inflated share purchase price and any later economic loss is not invariably strong. Shares are normally purchased with an eye toward a later sale. But if, say, the purchaser sells the shares quickly before the relevant truth begins to leak out, the misrepresentation will not have led to any loss. If the purchaser sells later after the truth makes its way into the marketplace, an initially inflated purchase price *might* mean a later loss. But that is far from inevitably so. When the

purchaser subsequently resells such shares, even at a lower price, that lower price may reflect, not the earlier misrepresentation, but changed economic circumstances, changed investor expectations, new industry-specific or firm-specific facts, conditions, or other events, which taken separately or together account for some or all of that lower price. (The same is true in respect to a claim that a share's higher price is lower than it would otherwise have been—a claim we do not consider here.) Other things being equal, the longer the time between purchase and sale, the more likely that this is so, *i. e.*, the more likely that other factors caused the loss.

Given the tangle of factors affecting price, the most logic alone permits us to say is that the higher purchase price will *sometimes* play a role in bringing about a future loss. It may prove to be a necessary condition of any such loss, and in that sense one might say that the inflated purchase price suggests that the misrepresentation (using language the Ninth Circuit used) "touches upon" a later economic loss. *Ibid.* But, even if that is so, it is insufficient. To "touch upon" a loss is not to *cause* a loss, and it is the latter that the law requires. 15 U. S. C. § 78u–4(b)(4).

For another thing, the Ninth Circuit's holding lacks support in precedent. Judicially implied private securities fraud actions resemble in many (but not all) respects common-law deceit and misrepresentation actions. See *Blue Chip Stamps, supra,* at 744; see also L. Loss & J. Seligman, Fundamentals of Securities Regulation 910–918 (5th ed. 2004) (describing relationship to common-law deceit). The common law of deceit subjects a person who "fraudulently" makes a "misrepresentation" to liability "for pecuniary loss caused" to one who justifiably relies upon that misrepresentation. Restatement (Second) of Torts § 525, p. 55 (1976) (hereinafter Restatement of Torts); see also *Southern Development Co.* v. *Silva,* 125 U. S. 247, 250 (1888) (setting forth elements of fraudulent misrepresentation). And the common law has long insisted that a plaintiff in such a case show

not only that had he known the truth he would not have acted but also that he suffered actual economic loss. See, *e. g.*, *Pasley* v. *Freeman*, 3 T. R. 51, 65, 100 Eng. Rep. 450, 457 (1789) (if "no injury is occasioned by the lie, it is not actionable: but if it be attended with a damage, it then becomes the subject of an action"); *Freeman* v. *Venner*, 120 Mass. 424, 426 (1876) (a mortgagee cannot bring a tort action for damages stemming from a fraudulent note that a misrepresentation led him to execute unless and until the note has to be paid); see also M. Bigelow, Law of Torts 101 (8th ed. 1907) (damage "must already have been suffered before the bringing of the suit"); 2 T. Cooley, Law of Torts § 348, p. 551 (4th ed. 1932) (plaintiff must show that he "suffered damage" and that the "damage followed proximately the deception"); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 110, p. 765 (5th ed. 1984) (hereinafter Prosser and Keeton) (plaintiff "must have suffered substantial damage," not simply nominal damages, before "the cause of action can arise").

Given the common-law roots of the securities fraud action (and the common-law requirement that a plaintiff show actual damages), it is not surprising that other Courts of Appeals have rejected the Ninth Circuit's "inflated purchase price" approach to proving causation and loss. See, *e. g.*, *Emergent Capital*, 343 F. 3d, at 198 (inflation of purchase price alone cannot satisfy loss causation); *Semerenko*, 223 F. 3d, at 185 (same); *Robbins*, 116 F. 3d, at 1448 (same); cf. *Bastian*, 892 F. 2d, at 685. Indeed, the Restatement of Torts, in setting forth the judicial consensus, says that a person who "misrepresents the financial condition of a corporation in order to sell its stock" becomes liable to a relying purchaser "for the loss" the purchaser sustains "when the facts . . . become generally known" and "as a result" share value "depreciate[s]." § 548A, Comment *b*, at 107. Treatise writers, too, have emphasized the need to prove proximate causation. Prosser and Keeton § 110, at 767 (losses do "not

afford any basis for recovery" if "brought about by business conditions or other factors").

We cannot reconcile the Ninth Circuit's "inflated purchase price" approach with these views of other courts. And the uniqueness of its perspective argues against the validity of its approach in a case like this one where we consider the contours of a judicially implied cause of action with roots in the common law.

Finally, the Ninth Circuit's approach overlooks an important securities law objective. The securities statutes seek to maintain public confidence in the marketplace. See *United States* v. *O'Hagan*, 521 U. S. 642, 658 (1997). They do so by deterring fraud, in part, through the availability of private securities fraud actions. *Randall* v. *Loftsgaarden*, 478 U. S. 647, 664 (1986). But the statutes make these latter actions available, not to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause. Cf. *Basic*, 485 U. S., at 252 (White, J., joined by O'CONNOR, J., concurring in part and dissenting in part) ("[A]llowing recovery in the face of affirmative evidence of nonreliance—would effectively convert Rule 10b–5 into a scheme of investor's insurance. There is no support in the Securities Exchange Act, the Rule, or our cases for such a result" (internal quotation marks and citations omitted)).

The statutory provision at issue here and the paragraphs that precede it emphasize this last mentioned objective. Private Securities Litigation Reform Act of 1995, 109 Stat. 737. The statute insists that securities fraud complaints "specify" each misleading statement; that they set forth the facts "on which [a] belief" that a statement is misleading was "formed"; and that they "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U. S. C. §§ 78u–4(b)(1), (2). And the statute expressly imposes on plaintiffs "the burden of proving" that the defendant's misrepresentations

"caused the loss for which the plaintiff seeks to recover." § 78u–4(b)(4).

The statute thereby makes clear Congress' intent to permit private securities fraud actions for recovery where, but only where, plaintiffs adequately allege and prove the traditional elements of causation and loss. By way of contrast, the Ninth Circuit's approach would allow recovery where a misrepresentation leads to an inflated purchase price but nonetheless does not proximately cause any economic loss. That is to say, it would permit recovery where these two traditional elements in fact are missing.

In sum, we find the Ninth Circuit's approach inconsistent with the law's requirement that a plaintiff prove that the defendant's misrepresentation (or other fraudulent conduct) proximately caused the plaintiff's economic loss. We need not, and do not, consider other proximate cause or loss-related questions.

B

Our holding about plaintiffs' need to *prove* proximate causation and economic loss leads us also to conclude that the plaintiffs' complaint here failed adequately to *allege* these requirements. We concede that the Federal Rules of Civil Procedure require only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2). And we assume, at least for argument's sake, that neither the Rules nor the securities statutes impose any special further requirement in respect to the pleading of proximate causation or economic loss. But, even so, the "short and plain statement" must provide the defendant with "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley* v. *Gibson*, 355 U. S. 41, 47 (1957). The complaint before us fails this simple test.

As we have pointed out, the plaintiffs' lengthy complaint contains only one statement that we can fairly read as describing the loss caused by the defendants' "spray device"

misrepresentations. That statement says that the plaintiffs "paid artificially inflated prices for Dura['s] securities" and suffered "damage[s]." App. 139a. The statement implies that the plaintiffs' loss consisted of the "artificially inflated" purchase "prices." The complaint's failure to claim that Dura's share price fell significantly after the truth became known suggests that the plaintiffs considered the allegation of purchase price inflation alone sufficient. The complaint contains nothing that suggests otherwise.

For reasons set forth in Part II–A, *supra*, however, the "artificially inflated purchase price" is not itself a relevant economic loss. And the complaint nowhere else provides the defendants with notice of what the relevant economic loss might be or of what the causal connection might be between that loss and the misrepresentation concerning Dura's "spray device."

We concede that ordinary pleading rules are not meant to impose a great burden upon a plaintiff. *Swierkiewicz* v. *Sorema N. A.*, 534 U. S. 506, 513–515 (2002). But it should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind. At the same time, allowing a plaintiff to forgo giving any indication of the economic loss and proximate cause that the plaintiff has in mind would bring about harm of the very sort the statutes seek to avoid. Cf. H. R. Conf. Rep. No. 104–369, p. 31 (1995) (criticizing "abusive" practices including "the routine filing of lawsuits . . . with only [a] faint hope that the discovery process might lead eventually to some plausible cause of action"). It would permit a plaintiff "with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence." *Blue Chip Stamps*, 421 U. S., at 741. Such a rule would tend to transform a private

securities action into a partial downside insurance policy. See H. R. Conf. Rep. No. 104–369, at 31; see also *Basic*, 485 U. S., at 252 (White, J., joined by O'CONNOR, J., concurring in part and dissenting in part).

For these reasons, we find the plaintiffs' complaint legally insufficient. We reverse the judgment of the Ninth Circuit, and we remand the case for further proceedings consistent with this opinion.

*It is so ordered.*

Syllabus

# PASQUANTINO ET AL. *v.* UNITED STATES

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 03–725. Argued November 9, 2004—Decided April 26, 2005

Petitioners carried out a scheme to smuggle large quantities of liquor into Canada from the United States to evade Canada's heavy alcohol import taxes. They were convicted of violating the federal wire fraud statute, 18 U. S. C. § 1343, for doing so. That statute prohibits the use of interstate wires to effect "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses." The Fourth Circuit affirmed their convictions, rejecting petitioners' argument that their prosecution contravened the common-law revenue rule, which bars courts from enforcing foreign sovereigns' tax laws. The Fourth Circuit also held that Canada's right to receive tax revenue was "money or property" within § 1343's meaning.

*Held:* A plot to defraud a foreign government of tax revenue violates the federal wire fraud statute. Pp. 355–372.

(a) Section 1343's plain terms criminalize a scheme such as petitioners'. Their smuggling operation satisfies both of the § 1343 elements that are in dispute here. First, Canada's right to uncollected excise taxes on the liquor petitioners imported into Canada is "property" within the statute's meaning. That right is an entitlement to collect money from petitioners, the possession of which is "something of value" to the Canadian Government. *McNally* v. *United States*, 483 U. S. 350, 358. Such valuable entitlements are "property" as that term ordinarily is employed. Second, petitioners' plot was a "scheme or artifice to defraud" Canada of its valuable entitlement to tax revenue, because petitioners routinely concealed imported liquor from Canadian officials and failed to declare those goods on customs forms. See *Durland* v. *United States*, 161 U. S. 306, 313. Pp. 355–359.

(b) The foregoing construction of § 1343 does not derogate from the common-law revenue rule. Pp. 359–372.

(1) Relying on the canon of construction that "'[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident,'" *United States* v. *Texas*, 507 U. S. 529, 534, petitioners argue that, to avoid reading § 1343 to derogate from the revenue rule, the Court should construe the otherwise-applicable statutory language to except frauds directed at

evading foreign taxes. Whether § 1343 derogates from the revenue rule depends on whether reading the statute to reach this prosecution conflicts with a well-established revenue rule principle. See *United States* v. *Craft*, 535 U. S. 274, 276. Thus, before concluding that Congress intended to exempt the present prosecution from § 1343's broad reach, the Court must find that the revenue rule clearly barred such a prosecution as of 1952, the year Congress enacted the wire fraud statute. See *Neder* v. *United States*, 527 U. S. 1, 22–23. Pp. 359–360.

(2) No common-law case decided as of 1952 clearly established that the revenue rule barred the United States from prosecuting a fraudulent scheme to evade foreign taxes. Pp. 360–368.

(i) The revenue rule has long been treated as a corollary of the rule that "[t]he Courts of no country execute the penal laws of another." *The Antelope*, 10 Wheat. 66, 123. It was first treated as such in cases prohibiting the enforcement of tax liabilities of one sovereign in the courts of another sovereign, such as suits to enforce tax judgments. The revenue rule's grounding in these cases shows that, at its core, it prohibited the collection of tax obligations of foreign nations. The present prosecution is unlike these classic examples of actions traditionally barred by the revenue rule. It is not a suit that recovers a foreign tax liability, but is a criminal prosecution brought by the United States to punish domestic criminal conduct. Pp. 360–362.

(ii) Cases applying the revenue rule to bar indirect enforcement of foreign revenue laws, in contrast to the direct collection of a tax obligation, cannot bear the weight petitioners place on them. Many of them were decided after Congress passed the wire fraud statute. Others come from foreign courts. And, significantly, none involved a domestic sovereign acting pursuant to authority conferred by a criminal statute to enforce the sovereign's own penal law. Moreover, none of petitioners' cases barred an action that had as its primary object the deterrence and punishment of fraudulent conduct—a substantial domestic regulatory interest entirely independent of foreign tax enforcement. The main object of the action in each of them was the collection of money that would pay foreign tax claims. The absence of such an object here means that the link between this prosecution and foreign tax collection is incidental and attenuated at best. Thus, it cannot be said whether Congress in 1952 would have considered this prosecution within the revenue rule. Petitioners answer unpersuasively that the recovery of taxes is indeed the object of this suit because restitution of Canada's lost tax revenue is required under the federal Mandatory Victims Restitution Act of 1996. Whether restitution is mandatory is irrelevant here because § 1343 advances the Government's independent interest in punishing fraudulent domestic criminal conduct. In any

event, if awarding restitution to foreign sovereigns were contrary to the revenue rule, the proper resolution would be to construe the later enacted restitution statute not to allow such awards, rather than to assume that it impliedly repealed § 1343 as applied to this prosecution. Pp. 362–365.

(iii) Also unavailing is petitioners' argument that early English common-law cases holding unenforceable contracts executed to evade other nations' revenue laws demonstrate that "indirect" enforcement of such laws is at the very core of the revenue rule, rather than at its margins. Those early cases were driven by an interest in lessening the commercial disruption caused by high tariffs. By the mid-20th century, however, that rationale was supplanted, and courts began to apply the revenue rule to tax obligations on the strength of the analogy between a country's revenue laws and its penal ones. Because the early English cases rested on a far different foundation from that on which the revenue rule came to rest, they say little about whether the wire fraud statute derogated from the revenue rule in its mid-20th-century form. Pp. 365–366.

(iv) Petitioners' criminal prosecution "enforces" Canadian revenue law in an attenuated sense, but not in a sense that clearly would contravene the revenue rule. That rule never proscribed all enforcement of foreign revenue law. For example, at the same time they were enforcing domestic contracts that had the purpose of violating foreign revenue law, English courts also considered void foreign contracts that lacked tax stamps required under foreign revenue law. The line the revenue rule draws between impermissible and permissible "enforcement" of foreign revenue law has therefore always been unclear. The uncertainty persisted in American cases, which demonstrate that the extent to which the revenue rule barred indirect recognition of foreign revenue laws was unsettled as of 1952. Pp. 366–368.

(3) The traditional rationales for the revenue rule do not plainly suggest that it barred this prosecution. First, this prosecution poses little risk of causing the principal evil against which the revenue rule was traditionally thought to guard: judicial evaluation of the revenue policies of foreign sovereigns. This action was brought by the Executive, "the sole organ of the federal government in the field of international relations," *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 320. Although a prosecution like this one requires a court to recognize foreign law to determine whether the defendant violated U. S. law, it may be assumed that by electing to prosecute, the Executive has assessed this prosecution's impact on this Nation's relationship with Canada, and concluded that it poses little danger of causing international friction. Petitioners' broader argument that the revenue rule avoids

giving domestic effect to politically sensitive and controversial policy decisions embodied in foreign revenue laws worries the Court little. The present prosecution, if authorized by the wire fraud statute, embodies the policy choice of the two political branches of Government—Congress and the Executive—to free the interstate wires from fraudulent use, irrespective of the object of the fraud. Such a reading of § 1343 gives effect to that considered policy choice and therefore poses no risk of advancing Canadian policies illegitimately. Finally, petitioners' assertion that courts lack the competence to examine the validity of unfamiliar foreign tax schemes is not persuasive here. Foreign law posed no unmanageable complexity in this case, and Federal Rule of Criminal Procedure 26.1 gives federal courts sufficient means to resolve any incidental foreign law issues that may arise in wire fraud prosecutions. Pp. 368–370.

(4) The Court's interpretation does not give § 1343 extraterritorial effect. Petitioners' offense was complete the moment they executed their scheme intending to defraud Canada of tax revenue inside the United States. See *Durland*, 161 U. S., at 313. Therefore, only domestic conduct is at issue here. In any event, because § 1343 punishes frauds executed "in interstate or foreign commerce," it is not a statute that involves only domestic concerns. Pp. 371–372.

336 F. 3d 321, affirmed.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, and KENNEDY, JJ., joined. GINSBURG, J., filed a dissenting opinion, in which BREYER, J., joined, and in which SCALIA and SOUTER, JJ., joined as to Parts II and III, *post*, p. 372.

*Laura W. Brill* argued the cause for petitioners. With her on the briefs were *Bruce R. Bryan* and *Jensen E. Barber.*

*Deputy Solicitor General Dreeben* argued the cause for the United States. With him on the brief were *Acting Solicitor General Clement, Assistant Attorney General Wray, Irving L. Gornstein,* and *Kirby A. Heller.**

JUSTICE THOMAS delivered the opinion of the Court.

At common law, the revenue rule generally barred courts from enforcing the tax laws of foreign sovereigns. The

**Joshua L. Dratel, Quentin Riegel,* and *Jeremy Maltby* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging reversal.

question presented in this case is whether a plot to defraud a foreign government of tax revenue violates the federal wire fraud statute, 18 U. S. C. § 1343 (2000 ed., Supp. II). Because the plain terms of § 1343 criminalize such a scheme, and because this construction of the wire fraud statute does not derogate from the common-law revenue rule, we hold that it does.

## I

Petitioners Carl J. Pasquantino, David B. Pasquantino, and Arthur Hilts were indicted for and convicted of federal wire fraud for carrying out a scheme to smuggle large quantities of liquor into Canada from the United States. According to the evidence presented at trial, the Pasquantinos, while in New York, ordered liquor over the telephone from discount package stores in Maryland. See 336 F. 3d 321, 325 (CA4 2003) (en banc). They employed Hilts and others to drive the liquor over the Canadian border, without paying the required excise taxes. *Ibid.* The drivers avoided paying taxes by hiding the liquor in their vehicles and failing to declare the goods to Canadian customs officials. *Id.*, at 333. During the time of petitioners' smuggling operation, between 1996 and 2000, Canada heavily taxed the importation of alcoholic beverages. See 1997 S. C., ch. 36, §§ 21.1(1), 21.2(1); Excise Act Schedule 1.(1), R. S. C., ch. E–14 (1985); Excise Act 2001, Schedule 4, ch. 22, 2002 S. C. 239. Uncontested evidence at trial showed that Canadian taxes then due on alcohol purchased in the United States and transported to Canada were approximately double the liquor's purchase price. App. 65–66.

Before trial, petitioners moved to dismiss the indictment on the ground that it stated no wire fraud offense. The wire fraud statute prohibits the use of interstate wires to effect "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U. S. C. § 1343 (2000 ed., Supp. II). Petitioners contended that the Government lacked a

sufficient interest in enforcing the revenue laws of Canada, and therefore that they had not committed wire fraud. App. 48–57. The District Court denied the motion, and the case went to trial. The jury convicted petitioners of wire fraud.

Petitioners appealed their convictions to the United States Court of Appeals for the Fourth Circuit, again urging that the indictment failed to state a wire fraud offense. They argued that their prosecution contravened the common-law revenue rule, because it required the court to take cognizance of the revenue laws of Canada. Over Judge Hamilton's dissent, the panel agreed and reversed the convictions. 305 F. 3d 291, 295 (2002). Petitioners also argued that Canada's right to collect taxes from them was not "money or property" within the meaning of the wire fraud statute, but the panel unanimously rejected that argument. *Id.*, at 294–295; *id.*, at 299 (Hamilton, J., dissenting).

The Court of Appeals granted rehearing en banc, vacated the panel's decision, and affirmed petitioners' convictions. 336 F. 3d 321 (CA4 2003). It concluded that the common-law revenue rule, rather than barring any recognition of foreign revenue law, simply allowed courts to refuse to enforce the tax judgments of foreign nations, and therefore did not preclude the Government from prosecuting petitioners. *Id.*, at 327–329. The Court of Appeals held as well that Canada's right to receive tax revenue was "money or property" within the meaning of the wire fraud statute. *Id.*, at 331–332.

We granted certiorari to resolve a conflict in the Courts of Appeals over whether a scheme to defraud a foreign government of tax revenue violates the wire fraud statute. 541 U. S. 972 (2004). Compare *United States* v. *Boots*, 80 F. 3d 580, 587 (CA1 1996) (holding that a scheme to defraud a foreign nation of tax revenue does not violate the wire fraud statute), with *United States* v. *Trapilo*, 130 F. 3d 547, 552–553 (CA2 1997) (holding that a scheme to defraud a foreign nation of tax revenue violates the wire fraud statute). We

agree with the Court of Appeals that it does and therefore affirm the judgment below.[1]

## II

We first consider whether petitioners' conduct falls within the literal terms of the wire fraud statute. The statute prohibits using interstate wires to effect "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U. S. C. § 1343 (2000 ed., Supp. II). Two elements of this crime, and the only two that petitioners dispute here, are that the defendant engage in a "scheme or artifice to defraud," *ibid.*, and that the "object of the fraud . . . be '[money or] property' in the victim's hands," *Cleveland* v. *United States*, 531 U. S. 12, 26 (2000).[2] Petitioners' smuggling operation satisfies both elements.

Taking the latter element first, Canada's right to uncollected excise taxes on the liquor petitioners imported into Canada is "property" in its hands. This right is an entitlement to collect money from petitioners, the possession of which is "something of value" to the Government of Canada. *McNally* v. *United States*, 483 U. S. 350, 358 (1987) (internal

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[1] We express no view on the related question whether a foreign government, based on wire or mail fraud predicate offenses, may bring a civil action under the Racketeer Influenced and Corrupt Organizations Act (RICO) for a scheme to defraud it of taxes. See *Attorney General of Canada* v. *R. J. Reynolds Tobacco Holdings, Inc.*, 268 F. 3d 103, 106 (CA2 2001) (holding that the Government of Canada cannot bring a civil RICO suit to recover for a scheme to defraud it of taxes); *Republic of Honduras* v. *Philip Morris Cos.*, 341 F. 3d 1253, 1255 (CA11 2003) (same with respect to other foreign governments).

[2] Although *Cleveland* interpreted the term "property" in the mail fraud statute, 18 U. S. C. § 1341 (2000 ed., Supp. II), we have construed identical language in the wire and mail fraud statutes *in pari materia*. See *Neder* v. *United States*, 527 U. S. 1, 20 (1999) ("'scheme or artifice to defraud'"); *Carpenter* v. *United States*, 484 U. S. 19, 25, and n. 6 (1987) ("scheme or artifice to defraud"; "money or property").

quotation marks omitted). Valuable entitlements like these are "property" as that term ordinarily is employed. See *Leocal* v. *Ashcroft*, 543 U. S. 1, 9 (2004) ("When interpreting a statute, we must give words their ordinary or natural meaning" (internal quotation marks omitted)); Black's Law Dictionary 1382 (4th ed. 1951) (defining "property" as "extend[ing] to every species of valuable right and interest"). Had petitioners complied with this legal obligation, they would have paid money to Canada. Petitioners' tax evasion deprived Canada of that money, inflicting an economic injury no less than had they embezzled funds from the Canadian treasury. The object of petitioners' scheme was to deprive Canada of money legally due, and their scheme thereby had as its object the deprivation of Canada's "property."

The common law of fraud confirms this characterization of Canada's right to excise taxes. The right to be paid money has long been thought to be a species of property. See 3 W. Blackstone, Commentaries on the Laws of England 153–155 (1768) (classifying a right to sue on a debt as personal property); 2 J. Kent, Commentaries on American Law *351 (same). Consistent with that understanding, fraud at common law included a scheme to deprive a victim of his entitlement to money. For instance, a debtor who concealed his assets when settling debts with his creditors thereby committed common-law fraud. 1 J. Story, Equity Jurisprudence § 378 (I. Redfield 10th rev. ed. 1870); *Chesterfield* v. *Janssen*, 28 Eng. Rep. 82, 2 Ves. Sen. 125 (ch. 1750); 1 S. Rapalje & R. Lawrence, A Dictionary of American and English Law 546 (1883). That made sense given the economic equivalence between money in hand and money legally due. The fact that the victim of the fraud happens to be the government, rather than a private party, does not lessen the injury.

Our conclusion that the right to tax revenue is property in Canada's hands, contrary to petitioners' contentions, is consistent with *Cleveland*, *supra*. In that case, the defendant,

Cleveland, had obtained a video poker license by making false statements on his license application. *Id.*, at 16–17. We held that a State's interest in an unissued video poker license was not "property," because the interest in choosing particular licensees was "'purely regulatory'" and "[could not] be economic." *Id.*, at 22–23. We also noted that "the Government nowhere allege[d] that Cleveland defrauded the State of any money to which the State was entitled by law." *Ibid.*

*Cleveland* is different from this case. Unlike a State's interest in allocating a video poker license to particular applicants, Canada's entitlement to tax revenue is a straightforward "economic" interest. There was no suggestion in *Cleveland* that the defendant aimed at depriving the State of any money due under the license; quite the opposite, there was "no dispute that [the defendant's partnership] paid the State of Louisiana its proper share of revenue" due. *Id.*, at 22. Here, by contrast, the Government alleged and proved that petitioners' scheme aimed at depriving Canada of money to which it was entitled by law. Canada could hardly have a more "economic" interest than in the receipt of tax revenue. *Cleveland* is therefore consistent with our conclusion that Canada's entitlement is "property" as that word is used in the wire fraud statute.

Turning to the second element at issue here, petitioners' plot was a "scheme or artifice to defraud" Canada of its valuable entitlement to tax revenue. The evidence showed that petitioners routinely concealed imported liquor from Canadian officials and failed to declare those goods on customs forms. See 336 F. 3d, at 333. By this conduct, they represented to Canadian customs officials that their drivers had no goods to declare. This, then, was a scheme "designed to defraud by representations," *Durland* v. *United States*, 161 U. S. 306, 313 (1896), and therefore a "scheme or artifice to defraud" Canada of taxes due on the smuggled goods.

Neither the antismuggling statute, 18 U. S. C. § 546,[3] nor U. S. tax treaties, see *Attorney General of Canada* v. *R. J. Reynolds Tobacco Holdings, Inc.*, 268 F. 3d 103, 115–119 (CA2 2001), convince us that petitioners' scheme falls outside the terms of the wire fraud statute.[4] Unlike the treaties and the antismuggling statute, the wire fraud statute punishes fraudulent use of domestic wires, whether or not such conduct constitutes smuggling, occurs aboard a vessel, or evades foreign taxes. See *post*, at 380, n. 9 (GINSBURG, J., dissenting) (noting that the antismuggling statute does not apply to this prosecution). Petitioners would be equally liable if they had used interstate wires to defraud Canada not of taxes due, but of money from the Canadian treasury. The wire fraud statute "applies without differentiation" to these two categories of fraud. *Clark* v. *Martinez*, 543 U. S. 371, 378 (2005). "To give these same words a different meaning

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[3] Section 546 provides:

"Any person owning in whole or in part any vessel of the United States who employs, or participates in, or allows the employment of, such vessel for the purpose of smuggling, or attempting to smuggle, or assisting in smuggling, any merchandise into the territory of any foreign government in violation of the laws there in force, if under the laws of such foreign government any penalty or forfeiture is provided for violation of the laws of the United States respecting the customs revenue, and any citizen of, or person domiciled in, or any corporation incorporated in, the United States, controlling or substantially participating in the control of any such vessel, directly or indirectly, whether through ownership of corporate shares or otherwise, and allowing the employment of said vessel for any such purpose, and any person found, or discovered to have been, on board of any such vessel so employed and participating or assisting in any such purpose, shall be fined under this title or imprisoned not more than two years, or both."

[4] Any overlap between the antismuggling statute and the wire fraud statute is beside the point. The Federal Criminal Code is replete with provisions that criminalize overlapping conduct. See Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 518, and n. 62 (2002); *United States* v. *Wells*, 519 U. S. 482, 505–509, and nn. 8–10 (1997) (STEVENS, J., dissenting). The mere fact that two federal criminal statutes criminalize similar conduct says little about the scope of either.

for each category would be to invent a statute rather than interpret one." *Ibid.* We therefore decline to "interpret [this] criminal statute more narrowly than it is written." *Brogan* v. *United States*, 522 U. S. 398, 406 (1998).

## III

We next consider petitioners' revenue rule argument. Petitioners argue that, to avoid reading § 1343 to derogate from the common-law revenue rule, we should construe the otherwise-applicable language of the wire fraud statute to except frauds directed at evading foreign taxes. Their argument relies on the canon of construction that "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *United States* v. *Texas*, 507 U. S. 529, 534 (1993) (internal quotation marks omitted). This presumption is, however, no bar to a construction that conflicts with a common-law rule if the statute "'speak[s] directly' to the question addressed by the common law." *Ibid.*

Whether the wire fraud statute derogates from the common-law revenue rule depends, in turn, on whether reading § 1343 to reach this prosecution conflicts with a well-established revenue rule principle. We clarified this constraint on the application of the nonderogation canon in *United States* v. *Craft*, 535 U. S. 274 (2002). The issue in *Craft* was whether the property interest of a tenant by the entirety was exempt from a federal tax lien. *Id.*, at 276. We construed the federal tax lien statute to reach such a property interest, despite the tension between that construction and the common-law rule that entireties property enjoys immunity from liens, because this "common-law rule was not so well established with respect to the application of a federal tax lien that we must assume that Congress considered the impact of its enactment on the question now before us."

*Id.*, at 288.[5] So too here, before we may conclude that Congress intended to exempt the present prosecution from the broad reach of the wire fraud statute, we must find that the common-law revenue rule clearly barred such a prosecution. We examine the state of the common law as of 1952, the year Congress enacted the wire fraud statute. See *Neder* v. *United States*, 527 U. S. 1, 22–23 (1999).[6]

The wire fraud statute derogates from no well-established revenue rule principle. We are aware of no common-law revenue rule case decided as of 1952 that held or clearly implied that the revenue rule barred the United States from prosecuting a fraudulent scheme to evade foreign taxes. The traditional rationales for the revenue rule, moreover, do not plainly suggest that it swept so broadly. We consider these two points in turn.

A

We first consider common-law revenue rule jurisprudence as it existed in 1952, the year Congress enacted § 1343. Since the late 19th and early 20th century, courts have treated the common-law revenue rule as a corollary of the

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[5] See also *United States* v. *Texas*, 507 U. S. 529, 534 (1993) (requiring the statute to "'speak directly' to the question addressed by the common law"); *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U. S. 104, 108 (1991) (stating that this presumption is applicable "where a common-law principle is well established"); *United States* v. *Turley*, 352 U. S. 407, 411 (1957) (declining to interpret the term "'stolen'" in a federal criminal statute according to the common law because the term had "no accepted common-law meaning").

[6] These principles convince us that much more than the summary conclusion that it is "unavoidably obvious . . . that this prosecution directly implicates the revenue rule" and that this prosecution is "'primarily about enforcing Canadian law,'" *post*, at 377, 382 (GINSBURG, J., dissenting), is required to demonstrate that a revenue rule principle firmly established as of 1952 bars this prosecution. That task requires inquiry into common-law revenue rule jurisprudence—an inquiry the dissent does not undertake.

rule that, as Chief Justice Marshall put it, "[t]he Courts of no country execute the penal laws of another." *The Antelope*, 10 Wheat. 66, 123 (1825). The rule against the enforcement of foreign penal statutes, in turn, tracked the common-law principle that crimes could only be prosecuted in the country in which they were committed. See, *e. g.*, J. Story, Commentaries on the Conflict of Laws § 620, p. 840 (M. Bigelow ed. 8th ed. 1883). The basis for inferring the revenue rule from the rule against foreign penal enforcement was an analogy between foreign revenue laws and penal laws. See *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 290 (1888); Leflar, Extrastate Enforcement of Penal and Governmental Claims, 46 Harv. L. Rev. 193, 219 (1932) (hereinafter Leflar).

Courts first drew that inference in a line of cases prohibiting the enforcement of tax liabilities of one sovereign in the courts of another sovereign, such as a suit to enforce a tax judgment.[7] The revenue rule's grounding in these cases shows that, at its core, it prohibited the collection of tax obligations of foreign nations. Unsurprisingly, then, the revenue rule is often stated as prohibiting the collection of foreign tax claims. See Brief for Petitioners 16 (noting that "[t]he most straightforward application of the revenue rule arises when a foreign sovereign attempts to sue directly in its own right to enforce a tax judgment in the courts of another nation").[8]

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[7] See *Colorado* v. *Harbeck*, 232 N. Y. 71, 85, 133 N. E. 357, 360 (App. 1921); *Maryland* v. *Turner*, 75 Misc. 9, 10–13, 132 N. Y. S. 173, 175 (Sup. Ct. 1911); *Detroit* v. *Proctor*, 44 Del. 193, 200–202, 61 A. 2d 412, 415–416 (Super. Ct. 1948); *Moore* v. *Mitchell*, 30 F. 2d 600, 603–604 (CA2 1929) (L. Hand, J., concurring) (citing cases), aff'd on other grounds, 281 U. S. 18 (1930); *Arkansas* v. *Bowen*, 20 D. C. 291, 295 (Sup. Ct. 1891), aff'd, 3 App. D. C. 537 (1894); Leflar 216, n. 63 (citing cases).

[8] See also *Her Majesty the Queen* v. *Gilbertson*, 597 F. 2d 1161, 1163–1164 (CA9 1979) (stating the revenue rule as an exception to the rule that a State enforces foreign judgments, citing, *inter alia*, pre-1952 cases); *Peter Buchanan Ltd.* v. *McVey*, 1955 A. C. 516, 526 (Ir. H. Ct. 1950),

The present prosecution is unlike these classic examples of actions traditionally barred by the revenue rule. It is not a suit that recovers a foreign tax liability, like a suit to enforce a judgment. This is a criminal prosecution brought by the United States in its sovereign capacity to punish domestic criminal conduct. Petitioners nevertheless argue that common-law revenue rule jurisprudence as of 1952 prohibited such prosecutions. Revenue rule cases, however, do not establish that proposition, much less clearly so.

1

Petitioners first analogize the present action to several cases that have applied the revenue rule to bar indirect enforcement of foreign revenue laws, in contrast to the direct collection of a tax obligation. They cite, for example, a decision of an Irish trial court holding that a private liquidator could not recover assets unlawfully distributed and moved to Ireland by a corporate director, because the recovery would go to satisfy the company's Scottish tax obligations. *Peter Buchanan Ltd.* v. *McVey*, 1955 A. C. 516, 529–530 (Ir. H. Ct. 1950), app. dism'd, 1955 A. C. 530 (Ir. Sup. Ct. 1951).[9]

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app. dism'd, 1955 A. C. 530 (Ir. Sup. Ct. 1951) (citing English revenue rule cases as "establish[ing] that the courts of our country will not enforce the revenue claims of a foreign country in a suit brought for the purpose by a foreign public authority"); Leflar 219 (stating the revenue rule as a prohibition on "extrastate actions for revenue collection"); *Moore*, *supra*, at 603 (L. Hand, J., concurring) (characterizing the revenue rule as an exception to the rule that a "liability arising under the law of a foreign state will be recognized by the courts of another"); *Harbeck*, *supra*, at 85, 133 N. E., at 360 (stating that the revenue rule "precludes one state from acting as a collector of taxes for a sister state"); cf. Restatement (Third) of Foreign Relations Law of the United States § 483 (1986) (stating that the rule does not require, but allows, courts to refuse enforcement of foreign tax judgments).

[9] Petitioners also cite *QRS 1 Aps* v. *Frandsen*, [2000] Int'l Litig. Proc. 8, [1999] 3 All E. R. 289 (App.) (holding that a liquidator was not entitled to recover corporate funds needed to pay foreign taxes); *Stringam* v. *Dubois*, [1993] 3 W. W. R. 273, 7 Alta. L. R. (3d) 120 (App. 1992) (rejecting suit by

The court found that "the sole object of the liquidation proceedings in Scotland was to collect a revenue debt," because if the liquidator won, "every penny recovered after paying certain costs . . . could be claimed by the Scottish Revenue." *Id.*, at 530. According to the *Buchanan* court, "[i]n every case the substance of the claim must be scrutinized, and if it then appears that it is really a suit brought for the purpose of collecting the debts of a foreign revenue it must be rejected." *Id.*, at 529.

*Buchanan* and the other cases on which petitioners rely cannot bear the weight petitioners place on them. Many of them were decided after 1952, too late for the Congress that passed the wire fraud statute to have relied on them. Others come from foreign courts. Drawing sure inferences regarding Congress' intent from such foreign citations is perilous, as several of petitioners' cases illustrate.[10]

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the U. S. executor of a will to require the sale of real property in Canada to pay U. S. estate taxes); *Banco Do Brasil, S. A.* v. *A. C. Israel Commodity Co.*, 12 N. Y. 2d 371, 377, 190 N. E. 2d 235, 237 (App. 1963) (rejecting suit by instrumentality of Brazil to recover for a conspiracy to circumvent its foreign exchange regulations); *United States* v. *Harden*, [1963] 44 W. W. R. 630, 633, S. C. R. 366, 370–371 (Sup. Ct. Can.) (holding that a stipulated judgment to pay U. S. taxes was not enforceable in Canadian courts); *Attorney-General for Canada* v. *Schulze*, [1901] 9 Scots Law Times 4, 4–5 (refusing to enforce judgment for court costs, where costs were incurred by a foreign state in defending the legality of its forfeiture of the defendant's goods as penalty for infraction of revenue laws); *Indian and General Investment Trust, Ltd.* v. *Borax Consolidated, Ltd.*, [1920] 1 K. B. 539, 550 (holding that a private debtor was not entitled to deduct U. S. income tax from its interest payments on loan due in England).

[10] For example, in *Government of India* v. *Taylor*, 1955 A. C. 491 (H. L.), on which petitioners rely heavily, the court's application of the revenue rule rested in part on a ground peculiar to English law, namely, that an Act of Parliament had excluded tax judgments from a statute that provided for the enforcement of foreign judgments. That Act thus demonstrated that the revenue rule "appear[ed] to have been recognized by Parliament." *Id.*, at 506; see also *Borax*, *supra*, at 549 (holding that a private debtor was not entitled to deduct U. S. income tax from its interest payments on a loan, in part because "there [was] an express Act of Parliament which

More important, none of these cases clearly establishes that the revenue rule barred this prosecution. None involved a domestic sovereign acting pursuant to authority conferred by a criminal statute. The difference is significant. An action by a domestic sovereign enforces the sovereign's own penal law. A prohibition on the enforcement of *foreign* penal law does not plainly prevent the Government from enforcing a *domestic* criminal law. Such an extension, to our knowledge, is unprecedented in the long history of either the revenue rule or the rule against enforcement of penal laws.

Moreover, none of petitioners' cases (with the arguable exception of *Banco Do Brasil, S. A.* v. *A. C. Israel Commodity Co.*, 12 N. Y. 2d 371, 190 N. E. 2d 235 (App. 1963)) barred an action that had as its primary object the deterrence and punishment of fraudulent conduct—a substantial domestic regulatory interest entirely independent of foreign tax enforcement. The main object of the action in each of those cases was the collection of money that would pay foreign tax claims. The absence of such an object in this action means that the link between this prosecution and foreign tax collection is incidental and attenuated at best, making it not plainly one in which "the whole object of the suit is to collect tax for a foreign revenue." *Buchanan*, *supra*, at 529. Even those courts that as of 1952 had extended the revenue rule beyond its core prohibition had not faced a case closely

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permits payment to the English Income Tax authorities to be a discharge pro tanto of the debt which a person owes in respect of yearly interest to another" while "[t]here [was] no Act of Parliament which allows payment of income tax to another country to be reckoned as discharge"); *Schulze*, *supra*, at 5 (holding that a foreign state could not recover court costs incurred in defending the legality of a tax forfeiture, in part because "in our [*i. e.*, Scottish] law, the expenses of an action have always been regarded as a mere accessory or incident of the principal claim"). In addition, as we explain below, features peculiar to the American system of separation of powers cast doubt on the notion that the revenue rule bars this prosecution. See *infra*, at 369–370.

analogous to this one—and thus we cannot say with any reasonable certainty whether Congress in 1952 would have considered this prosecution within the revenue rule.

Petitioners answer that the recovery of taxes is indeed the object of this suit, because restitution of the lost tax revenue to Canada is required under the Mandatory Victims Restitution Act of 1996, 18 U. S. C. §§3663A–3664 (2000 ed. and Supp. II).[11] We do not think it matters whether the provision of restitution is mandatory in this prosecution. Regardless, the wire fraud statute advances the Federal Government's independent interest in punishing fraudulent domestic criminal conduct, a significant feature absent from all of petitioners' revenue rule cases. The purpose of awarding restitution in this action is not to collect a foreign tax, but to mete out appropriate criminal punishment for that conduct.

In any event, any conflict between mandatory restitution and the revenue rule would not change our holding today. If awarding restitution to foreign sovereigns were contrary to the revenue rule, the proper resolution would be to construe the Mandatory Victims Restitution Act not to allow such awards, rather than to assume that the later enacted restitution statute impliedly repealed §1343 as applied to frauds against foreign sovereigns.

2

We are no more persuaded by a second line of cases on which petitioners rely. Petitioners analogize the present case to early English common-law cases from which the revenue rule originally derived. Those early cases involved contract law, and they held that contracts executed with the purpose of evading the revenue laws of other nations were enforceable, notwithstanding the rule against enforcing con-

[11] See 18 U. S. C. §3663A(c)(1)(A)(ii) ("This section shall apply in all sentencing proceedings for convictions of . . . an offense against property under this title . . . including any offense committed by fraud or deceit").

tracts with illegal purposes. See *Boucher* v. *Lawson*, Cas. T. Hard. 85, 89–90, 95 Eng. Rep. 53, 55–56 (K. B. 1734); *Planche* v. *Fletcher*, 1 Dougl. 251, 99 Eng. Rep. 164 (K. B. 1779). Petitioners argue that these cases demonstrate that "indirect" enforcement of revenue laws is at the very core of the common-law revenue rule, rather than at its margins.

The argument is unavailing. By the mid-20th century, the revenue rule had developed into a doctrine very different from its original form. Early revenue rule cases were driven by the interest in lessening the commercial disruption caused by the high tariffs of the day. As Lord Hardwicke explained, if contracts that aimed at circumventing foreign revenue laws were unenforceable, "it would cut off all benefit of such trade from this kingdom, which would be of very bad consequence to the principal and most beneficial branches of our trade." *Boucher*, *supra*, at 89, 95 Eng. Rep., at 56. By the 20th century, however, that rationale for the revenue rule had been supplanted. By then, as we have explained, courts had begun to apply the revenue rule to tax obligations on the strength of the analogy between a country's revenue laws and its penal ones, see *supra*, at 360–361, superseding the original promotion-of-commerce rationale for the rule. Dodge, Breaking the Public Law Taboo, 43 Harv. Int'l L. J. 161, 178 (2002); *Buchanan*, 1955 A. C., at 522–524, 528–529. The early English cases rest on a far different foundation from that on which the revenue rule came to rest. They thus say little about whether the wire fraud statute derogated from the revenue rule in its mid-20th-century form.

3

Granted, this criminal prosecution "enforces" Canadian revenue law in an attenuated sense, but not in a sense that clearly would contravene the revenue rule. From its earliest days, the revenue rule never proscribed all enforcement of foreign revenue law. For example, at the same time they were enforcing domestic contracts that had the purpose of

violating foreign revenue law, English courts also considered void foreign contracts that lacked tax stamps required under foreign revenue law. See *Alves* v. *Hodgson*, 7 T. R. 241, 243, 101 Eng. Rep. 953, 955 (K. B. 1797); *Clegg* v. *Levy*, 3 Camp. 166, 167, 170 Eng. Rep. 1343 (N. P. 1812). Like the present prosecution, cases voiding foreign contracts under foreign law no doubt "enforced" foreign revenue law in the sense that they encouraged the payment of foreign taxes; yet they fell outside the revenue rule's scope. The line the revenue rule draws between impermissible and permissible "enforcement" of foreign revenue law has therefore always been unclear.

The uncertainty persisted in American courts that recognized the revenue rule. In one of the earliest appearances of the revenue rule in America, the Supreme Court of New Hampshire entertained an action that required extensive recognition of a sister State's revenue laws. *Henry* v. *Sargeant*, 13 N. H. 321 (1843). There, the plaintiff sought damages, alleging that a Vermont selectman had imposed an illegal tax on him. *Id.*, at 331. The court found that the revenue rule did not bar the action, *id.*, at 331–332, though the suit required the court to enforce the revenue laws of Vermont, see *id.*, at 335–338.

Likewise, in *In re Hollins*, 79 Misc. 200, 139 N. Y. S. 713 (Sur. Ct.), aff'd, 160 App. Div. 886, 144 N. Y. S. 1121 (1913), aff'd, 212 N. Y. 567, 106 N. E. 1034 (App. 1914) *(per curiam)*, the court held that an estate executor could satisfy foreign taxes due on a decedent's estate out of property of the estate, notwithstanding a legatee's argument that the revenue rule barred authorizing such payments. 79 Misc., at 207–208, 139 N. Y. S., at 716–717. The court explained:

> "While it is doubtless true that this court will not aid a foreign country in the enforcement of its revenue laws, it will not refuse to direct a just and equitable administration of that part of an estate within its jurisdiction merely because such direction would result in the

> enforcement of such revenue laws." *Id.*, at 208, 139 N. Y. S., at 717.

These cases demonstrate that the extent to which the revenue rule barred indirect recognition of foreign revenue laws was unsettled as of 1952. Following the reasoning of *In re Hollins*, for instance, Congress might well have thought that courts would enforce the wire fraud statute, even if doing so might incidentally recognize Canadian revenue law. The uncertainty highlights that "[i]ndirect enforcement is . . . easier to describe than to define," and "it is sometimes difficult to draw the line between an issue involving merely recognition of a foreign law and indirect enforcement of it." 1 A. Dicey & J. Morris, Conflict of Laws 90 (L. Collins gen. ed. 13th ed. 2000). Even if the present prosecution is analogous to the indirect enforcement cases on which petitioners rely, those cases do not yield a rule sufficiently well established to narrow the wire fraud statute in the context of this criminal prosecution.

B

Having concluded that revenue rule jurisprudence is no clear bar to this prosecution, we next turn to whether the purposes of the revenue rule, as articulated in the relevant authorities, suggest differently. They do not.

First, this prosecution poses little risk of causing the principal evil against which the revenue rule was traditionally thought to guard: judicial evaluation of the policy-laden enactments of other sovereigns. See, *e. g.*, *Moore* v. *Mitchell*, 30 F. 2d 600, 604 (CA2 1929) (L. Hand, J., concurring). As Judge Hand put it, allowing courts to enforce another country's revenue laws was thought to be a delicate inquiry

> "when it concerns the relations between the foreign state and its own citizens . . . . To pass upon the provisions for the public order of another state is, or at any rate should be, beyond the powers of a court; it involves

> the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted to other authorities." *Ibid.*

The present prosecution creates little risk of causing international friction through judicial evaluation of the policies of foreign sovereigns. This action was brought by the Executive to enforce a statute passed by Congress. In our system of government, the Executive is "the sole organ of the federal government in the field of international relations," *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 320 (1936), and has ample authority and competence to manage "the relations between the foreign state and its own citizens" and to avoid "embarass[ing] its neighbor[s]," *Moore*, *supra*, at 604 (L. Hand, J., concurring); see also *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948). True, a prosecution like this one requires a court to recognize foreign law to determine whether the defendant violated U. S. law. But we may assume that by electing to bring this prosecution, the Executive has assessed this prosecution's impact on this Nation's relationship with Canada, and concluded that it poses little danger of causing international friction. We know of no common-law court that has applied the revenue rule to bar an action accompanied by such a safeguard, and neither petitioners nor the dissent directs us to any. The greater danger, in fact, would lie in our judging this prosecution barred based on the foreign policy concerns animating the revenue rule, concerns that we have "neither aptitude, facilities nor responsibility" to evaluate. *Ibid.*

More broadly, petitioners argue that the revenue rule avoids giving domestic effect to politically sensitive and controversial policy decisions embodied in foreign revenue laws, regardless of whether courts need pass judgment on such laws. See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 448 (1964) (White, J., dissenting) ("[C]ourts customarily

refuse to enforce the revenue and penal laws of a foreign state, since no country has an obligation to further the governmental interests of a foreign sovereign"). This worries us little here. The present prosecution, if authorized by the wire fraud statute, embodies the policy choice of the two political branches of our Government—Congress and the Executive—to free the interstate wires from fraudulent use, irrespective of the object of the fraud. Such a reading of the wire fraud statute gives effect to that considered policy choice. It therefore poses no risk of advancing the policies of Canada illegitimately.

Still a final revenue rule rationale petitioners urge is the concern that courts lack the competence to examine the validity of unfamiliar foreign tax schemes. See, *e. g.*, Leflar 218. Foreign law, of course, posed no unmanageable complexity in this case. The District Court had before it uncontroverted testimony of a Government witness that petitioners' scheme aimed at violating Canadian tax law. See App. 65–66.

Nevertheless, Federal Rule of Criminal Procedure 26.1 addresses petitioners' concern by setting forth a procedure for interpreting foreign law that improves on those available at common law. Specifically, it permits a court, in deciding issues of foreign law, to consider "any relevant material or source—including testimony—without regard to the Federal Rules of Evidence." By contrast, common-law procedures for dealing with foreign law—those available to the courts that formulated the revenue rule—were more cumbersome. See Advisory Committee's Notes on Fed. Rule Crim. Proc. 26.1, 18 U. S. C. App., p. 1606 (noting that the rule improves on common-law procedures for proving foreign law). Rule 26.1 gives federal courts sufficient means to resolve the incidental foreign law issues they may encounter in wire fraud prosecutions.

## IV

Finally, our interpretation of the wire fraud statute does not give it "extraterritorial effect."[12] *Post*, at 378 (GINSBURG, J., dissenting). Petitioners used U. S. interstate wires to execute a scheme to defraud a foreign sovereign of tax revenue. Their offense was complete the moment they executed the scheme inside the United States; "[t]he wire fraud statute punishes the scheme, not its success." *United States* v. *Pierce*, 224 F. 3d 158, 166 (CA2 2000) (internal quotation marks and brackets in original omitted); see *Durland*, 161 U. S., at 313 ("The significant fact is the intent and purpose"). This domestic element of petitioners' conduct is what the Government is punishing in this prosecution, no less than when it prosecutes a scheme to defraud a foreign individual or corporation, or a foreign government acting as a market participant. See *post*, at 379, n. 8 (GINSBURG, J., dissenting) (noting that such prosecutions of foreign individuals, corporations, and governments are domestic applications of the wire fraud statute).[13] In any event, the wire fraud statute punishes frauds executed "in interstate or for-

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[12] As some indication of the novelty of the dissent's "extraterritoriality" argument, we note that this argument was not pressed or passed upon below and was raised only as an afterthought in petitioners' reply brief, depriving the Government of a chance to respond. Reply Brief for Petitioners 17–18.

[13] The dissent says that a scheme to defraud a foreign corporation or individual "does not necessarily depend on any determination of foreign law" and therefore "is of a different order." *Post*, at 379, n. 8 (opinion of GINSBURG, J.). That is not so. Many such schemes will necessarily require interpretation of foreign law. Without proof of foreign law, it is impossible to tell whether the scheme had the purpose of depriving the foreign corporation or individual of valuable property interests as defined by foreign law. See *supra*, at 355–356; *United States* v. *Pierce*, 224 F. 3d 158, 165–168 (CA2 2000). The fact that a prosecution might involve foreign revenue law, rather than any other type of foreign law, is relevant to whether such a prosecution is in derogation of the revenue rule, see *supra*, at 359–370, not to whether it is "extraterritorial."

eign commerce," 18 U. S. C. § 1343 (2000 ed., Supp. II), so this is surely not a statute in which Congress had only "domestic concerns in mind." *Small* v. *United States*, *post*, at 388.

* * *

It may seem an odd use of the Federal Government's resources to prosecute a U. S. citizen for smuggling cheap liquor into Canada. But the broad language of the wire fraud statute authorizes it to do so, and no canon of statutory construction permits us to read the statute more narrowly. The judgment of the Court of Appeals is affirmed.[14]

*It is so ordered.*

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, and with whom JUSTICE SCALIA and JUSTICE SOUTER join as to Parts II and III, dissenting.

This case concerns extension of the "wire fraud" statute, 18 U. S. C. § 1343 (2000 ed., Supp. II), to a scenario extraterritorial in significant part: The Government invoked the statute to reach a scheme to smuggle liquor from the United States into Canada and thereby deprive Canada of revenues due under that nation's customs and tax laws. Silent on its application to activity culminating beyond our borders, the statute prohibits "any scheme" to defraud that employs in its execution communication through interstate or interna-

[14] Petitioners argue in a footnote that their sentences should be vacated in light of *Blakely* v. *Washington*, 542 U. S. 296 (2004). Brief for Petitioners 26, n. 29. Petitioners did not raise this claim before the Court of Appeals or in their petition for certiorari. We therefore decline to address it. See, *e. g.*, *Lopez* v. *Davis*, 531 U. S. 230, 244, n. 6 (2001) (declining to address "matter . . . not raised or decided below, or presented in the petition for certiorari"); *Whitfield* v. *United States*, 543 U. S. 209 (2005) (affirming federal convictions despite the imposition of sentence enhancements, see Brief for Petitioners therein, O. T. 2004, No. 03–1293 etc., p. 7, n. 6).

tional wires. A relevant background norm, known as the common-law revenue rule, bars suit in one country to enforce another country's tax laws.

The scheme at issue involves liquor purchased from discount sellers in Maryland, trucked to New York, then smuggled into Canada to evade Canada's hefty tax on imported alcohol.[1] Defendants below, petitioners here, were indicted under § 1343 for devising a scheme "to defraud the governments of Canada and the Province of Ontario of excise duties and tax revenues relating to the importation and sale of liquor." App. to Pet. for Cert. 58a. Each of the six counts in question was based on telephone calls between New York and Maryland. *Id.*, at 60a–64a.

The Court today reads the wire fraud statute to draw into our courts, at the prosecutor's option, charges that another nation's revenue laws have been evaded. The common-law revenue rule does not stand in the way, the Court instructs, for that rule has no application to criminal prosecutions under the wire fraud statute.

As I see it, and as petitioners urged, Reply Brief 17–19, the Court has ascribed an exorbitant scope to the wire fraud statute, in disregard of our repeated recognition that "Congress legislates against the backdrop of the presumption against extraterritoriality." See *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 248 (1991) *(ARAMCO); Small* v. *United States, post,* at 388–389 (The Court has "adopt[ed] the legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application."); Reply Brief 17, n. 23 ("This prosecution clearly gives the wire fraud statute extraterritorial effect in that '[t]he actions in [Canada] are . . . most naturally understood as the kernel of' Petitioners' alleged fraud." (quoting *Sosa* v. *Alvarez-*

[1] The Government offered a Canadian customs officer's testimony at trial that if alcohol is purchased for $56 per case in the United States, the Canadian tax would be approximately $100 per case. App. 65–66; see *infra,* at 376, n. 4.

*Machain*, 542 U. S. 692, 700–701 (2004))).[2] Notably, when Congress explicitly addressed international smuggling, see 18 U. S. C. § 546, it provided for criminal enforcement of the customs laws of a foreign nation only when that nation has a reciprocal law criminalizing smuggling into the United States. Currently, Canada has no such reciprocal law.

Of overriding importance in this regard, tax collection internationally is an area in which treaties hold sway. See *Attorney General of Canada* v. *R. J. Reynolds Tobacco Holdings, Inc.*, 268 F. 3d 103, 115–119 (CA2 2001) (referencing tax treaties to which the United States is a party). There is a treaty between the United States and Canada regarding the collection of taxes, but that accord requires certification by the taxing nation that the taxes owed have been "finally determined." See Protocol Amending the Convention with Respect to Taxes on Income and on Capital, Sept. 26, 1980, S. Treaty Doc. No. 104–4, 2030 U. N. T. S. 236, 245, Art. 15, ¶ 2 (entered into force Nov. 9, 1995) (hereinafter Protocol). Moreover, the treaty is inapplicable to persons, like petitioners in this case, who are United States citizens at the time that the tax liability is incurred. *Id.*, at 246, Art. 15, ¶ 8.

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[2] Petitioners' reliance on the presumption against extraterritorial application of laws enacted with domestic concerns in mind was no mere afterthought. See *ante*, at 371, n. 12. The presumption was explicitly featured in petitioners' reply brief. See Reply Brief 17–19, and n. 23 (observing, *inter alia*, that the presumption against extraterritoriality "is especially true when criminal liability is at stake"); see also Brief for Petitioners 40, n. 46. Both parties ask us to determine the scope of § 1343, and the presumption against extraterritoriality is a guide to interpretation of the kind courts ordinarily bring to bear in endeavoring to discern the meaning of a legislative text. Moreover, the Government's responses to petitioners' revenue rule arguments coincide with the Government's position on the presumption against extraterritoriality. Compare Brief for United States 22–26 with Tr. of Oral Arg. 35, 46–47 (responding to the Court's questions about extraterritoriality, counsel for the Government asserted that Congress left to executive discretion the determination whether "enforcement of [foreign] tax systems" is appropriate).

Today's novel decision is all the more troubling for its failure to take account of Canada's primary interest in the matter at stake. United States citizens who have committed criminal violations of Canadian tax law can be extradited to stand trial in Canada.[3] Canadian courts are best positioned to decide "whether, and to what extent, the defendants have defrauded the governments of Canada and Ontario out of tax revenues owed pursuant to their own, sovereign, excise laws." 336 F. 3d 321, 343 (CA4 2003) (en banc) (Gregory, J., dissenting).

I

The Government's prosecution of David Pasquantino, Carl Pasquantino, and Arthur Hilts for wire fraud was grounded in Canadian customs and tax laws. The wire fraud statute, 18 U. S. C. § 1343, required the Government to allege and prove that the defendants engaged in a scheme to defraud a victim—here, the Canadian Government—of money or property. See *ante*, at 356 (describing Canada as the "victim" of a scheme having "as its object the deprivation of Canada's 'property' "). To establish the fraudulent nature of the defendants' scheme and the Canadian Government's entitlement to the money withheld by the defendants, the United States offered proof at trial that Canada imposes import duties on liquor, and that the defendants intended to evade those duties. See App. to Pet. for Cert. 58a; App. 65–74. The defendants' convictions for wire fraud therefore resulted from, and could not have been obtained without proof of, their intent to violate Canadian revenue laws. See *United States* v. *Pierce*, 224 F. 3d 158, 166–168 (CA2 2000) ("If no Canadian duty or tax actually existed, the [defendants] were no more guilty of wire fraud than they would have been had

[3] Indeed, the defendants have all been indicted in Canada for failing to report excise taxes and possession of unlawfully imported spirits, 336 F. 3d 321, 343 (CA4 2003) (en banc) (Gregory, J., dissenting), but Canada has not requested their extradition, see Tr. of Oral Arg. 12–13, 30.

they used the wires" to smuggle liquor into New York City, "in the sincere but mistaken belief that New York City imposes a duty on such . . . shipments.").

The United States Government's reliance on Canadian customs and tax laws continued at sentencing. The United States Sentencing Guidelines mandated that the defendants be sentenced on the basis of, among other things, the amount by which the defendants defrauded the Canadian Government. See United States Sentencing Commission, Guidelines Manual § 2F1.1(b)(1) (Nov. 2000). Accordingly, the District Court calculated the number of cases of liquor smuggled into Canada and the aggregate amount of import duties evaded by the defendants. The court concluded that the Pasquantinos avoided over $2.5 million in Canadian duties, and Hilts, over $1.1 million. See App. 97–101, 104–105.[4] The resulting offense-level increases yielded significantly

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[4] The casual manner in which the Government and the District Court reached these totals detracts from the Court's assertion that "[f]oreign law, of course, posed no unmanageable complexity in this case." *Ante*, at 370. In making its sentencing recommendation to the court, the Government did not proffer evidence of the precise rate at which Canada taxes liquor imports, or reference any provisions of Canadian law. Rather, it relied on the trial testimony of an intelligence officer with Canadian Customs, who surmised, based on her experience in working at the border, that Canadian taxes on a $56 case of liquor would be approximately $100. See App. 104. The customs officer was not offered as an expert witness and "[t]he [D]istrict [C]ourt never determined whether [her] calculations were accurate as a matter of Canadian law." 336 F. 3d, at 343 (Gregory, J., dissenting). Thus, if foreign law posed no complexity in this case, it is not because the parties and the court were easily able to interpret and apply Canadian law, but rather because the Government and the court made no serious attempt to do so. That no such effort was made here, in derogation of the Government's and the court's shared obligation to ensure that the calculations potentially affecting a defendant's sentence are as accurate as possible, is "deeply troubling," *ibid.*, and suggests that the Government was unprepared to grapple with the details of foreign revenue laws.

longer sentences for the defendants.[5] As Judge Gregory stated in dissent below, the fact that "the bulk of the defendants' sentences were related, not to the American crime of wire fraud, but to the Canadian crime of tax evasion," shows that "this case was primarily about enforcing Canadian law." 336 F. 3d, at 342–343.

Expansively interpreting the text of the wire fraud statute, which prohibits "any scheme or artifice to defraud, or for obtaining money or property by means of . . . fraudulent pretenses," the Court today upholds the Government's deployment of § 1343 essentially to enforce foreign tax law. This Court has several times observed that the wire fraud statute has a long arm, extending to "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future." *Durland* v. *United States*, 161 U. S. 306, 313 (1896). But the Court has also recognized that incautious reading of the statute could dramatically expand the reach of federal criminal law, and we have refused to apply the proscription exorbitantly. See *McNally* v. *United States*, 483 U. S. 350, 360 (1987) (refusing

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[5] I note that petitioners' sentences were enhanced on the basis of judicial factfindings, in violation of the Sixth Amendment. See *United States* v. *Booker*, 543 U. S. 220, 230–234 (2005) (STEVENS, J., for the Court); see also *Blakely* v. *Washington*, 542 U. S. 296 (2004). Despite the Court's affirmance of their convictions, therefore, petitioners may be entitled to resentencing. See *Booker*, 543 U. S., at 268 (BREYER, J., for the Court). The Court declines to address the defendants' plea for resentencing, stating that "[p]etitioners did not raise this claim before the Court of Appeals or in their petition for certiorari." See *ante*, at 372, n. 14. This omission was no fault of the defendants, however, as the petition in this case was filed and granted well before the Court decided *Blakely*. Petitioners thus raised *Blakely* at the earliest possible point: in their merits briefing. The rule that we do not consider issues not raised in the petition is prudential, not jurisdictional, see *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U. S. Philips Corp.*, 510 U. S. 27, 32–33 (1993) *(per curiam)*, and a remand on the *Blakely-Booker* question would neither prejudice the Government nor require this Court to delve into complex issues not passed on below.

to construe 18 U. S. C. § 1341, the mail fraud statute, to reach corruption in local government, stating: "[W]e read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has."); see also *Cleveland* v. *United States*, 531 U. S. 12, 24–25 (2000) (holding that § 1341 does not reach schemes to make false statements on a state license application, in part based on reluctance to "approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress").[6]

Construing § 1343 to encompass violations of foreign revenue laws, the Court ignores the absence of anything signaling Congress' intent to give the statute such an extraordinary extraterritorial effect.[7] "It is a longstanding principle of American law," *ARAMCO*, 499 U. S., at 248, that Congress, in most of its legislative endeavors, "is primarily concerned with domestic conditions," *ibid.* (quoting *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 285 (1949)). See also *Small*, *post*, at 388 (interpreting the phrase "convicted in any court," 18 U. S. C. § 922(g)(1), in light of the "commonsense notion" that Congress ordinarily intends statutes to have only domestic application (quoting *Smith* v. *United States*, 507 U. S. 197, 204, n. 5 (1993))). Absent a clear statement of "the affirmative intention of the Congress," *Benz* v. *Compania Naviera Hidalgo, S. A.*, 353 U. S. 138, 147 (1957), this Court ordinarily does not read statutes to reach conduct that is "the primary concern of a foreign country," *Foley Bros.*, 336 U. S., at 286; cf. *F. Hoffmann-La Roche Ltd* v. *Empagran*

[6] I note that, on the Court's interpretation, federal prosecutors could resort to the wire and mail fraud statutes to reach schemes to evade not only foreign taxes, but state and local taxes as well.

[7] I do not read into § 1343's coverage of frauds executed "in interstate or foreign commerce," *ante*, at 371–372, congressional intent to give § 1343 extraterritorial effect. A statute's express application to acts committed in foreign commerce, the Court has repeatedly held, does not in itself indicate a congressional design to give the statute extraterritorial effect. See *ARAMCO*, 499 U. S. 244, 250–253 (1991).

*S. A.*, 542 U. S. 155, 164 (2004) (referring to presumption that "legislators take account of the legitimate sovereign interests of other nations when they write American laws").

Section 1343, which contains no reference to foreign law as an element of the domestic crime of wire fraud, contrasts with federal criminal statutes that chart the courts' course in this regard. See, *e. g.*, 18 U. S. C. § 1956(c)(1) (defendant must know that transaction involved the proceeds of activity "that constitutes a felony under State, Federal, or foreign law"); 16 U. S. C. § 3372(a)(2)(A) (banning importation of wildlife that has been "taken, possessed, transported, or sold in violation of any . . . foreign law"). These statutes indicate that Congress, which has the sole authority to determine the extraterritorial reach of domestic laws, is fully capable of conveying its policy choice to the Executive and the courts. I would not assume from legislative silence that Congress left the matter to executive discretion.[8]

The presumption against extraterritoriality, which guides courts in the absence of congressional direction, provides ample cause to conclude that § 1343 does not extend to the instant scheme. Moreover, as to foreign customs and tax laws, there is scant room for doubt about Congress' general

[8]The application of 18 U. S. C. § 1343 (2000 ed., Supp. II) to schemes to defraud a foreign individual or corporation, or even a foreign governmental entity acting as a market participant, is of a different order, and does not necessarily depend on any determination of foreign law. As the Court of Appeals observed in *United States* v. *Boots*, 80 F. 3d 580, 587 (CA1 1996), upholding a defendant's wire fraud conviction in a case like the one here presented "would amount functionally to penal enforcement of Canadian customs and tax laws." See also *ibid.* (noting that courts "will enforce foreign non-tax civil judgments unless due process, jurisdictional, or fundamental public policy considerations interfere" (citing Restatement (Third) of Foreign Relations Law of the United States § 483, and Reporters' Notes, n. 1 (1986)), but "[o]ur courts customarily refuse to enforce the revenue and penal laws of a foreign state, since no country has an obligation to further the governmental interests of a foreign sovereign" (quoting *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 448 (1964) (White, J., dissenting))).

perspective: Congress has actively indicated, through both domestic legislation and treaties, that it intends "strictly [to] limit the parameters of any assistance given" to foreign nations. *Attorney General of Canada* v. *R. J. Reynolds Tobacco Holdings, Inc.*, 268 F. 3d, at 119; see also *United States* v. *Boots*, 80 F. 3d 580, 588 (CA1 1996) ("National [foreign] policy judgments . . . could be undermined if federal courts were to give general effect to wire fraud prosecutions for . . . violating the revenue laws of any country.").

First, Congress has enacted a specific statute criminalizing offenses of the genre committed by the defendants here: 18 U. S. C. § 546 prohibits transporting goods "into the territory of any foreign government in violation of the laws there in force." Section 546's application, however, is expressly conditioned on the foreign government's enactment of reciprocal legislation prohibiting smuggling into the United States. See *ibid.* (prohibition applies "if under the laws of such foreign government any penalty or forfeiture is provided for violation of the laws of the United States respecting the customs revenue"). The reciprocity limitation reflects a legislative determination that this country should not provide other nations with greater enforcement assistance than they give to the United States. The limitation also cabins the Government's discretion as to which nation's customs laws to enforce, thereby avoiding the appearance of prosecutorial overreaching. See 305 F. 3d 291, 297, n. 9 (CA4 2002) (Gregory, J.) ("Where do we draw the line as to which countries' laws we will help enforce?"), vacated and reh'g en banc granted, 2003 U. S. App. LEXIS 585, *1 (CA4, Jan. 14, 2003). Significantly, Canada has no statute criminalizing smuggling into the United States, rendering § 546 inapplicable to schemes resembling the one at issue here.[9]

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[9] Section 546's requirement that a vessel have been used to transport the goods to the foreign country would render § 546 inapplicable to these defendants' conduct in any event.

Second, the United States and Canada have negotiated, and the Senate has ratified, a comprehensive tax treaty, in which both nations have committed to providing collection assistance with respect to each other's tax claims. See Protocol Art. 15. Significantly, the Protocol does not call upon either nation to interpret or calculate liability under the other's tax statutes; it applies only to tax claims that have been fully and finally adjudicated under the law of the requesting nation. Further, the Protocol bars assistance in collecting any claim against a citizen or corporation of "the requested State." *Id.*, at 246, Art. 15, ¶ 8(a). These provisions would preclude Canada from obtaining United States assistance in enforcing its claims against the Pasquantinos and Hilts. I would not assume that Congress understood § 1343 to provide the assistance that the United States, in the considered foreign policy judgment of both political branches, has specifically declined to promise.

## II

Complementing the principle that courts ordinarily should await congressional instruction before giving our laws extraterritorial thrust, the common-law revenue rule holds that one nation generally does not enforce another's tax laws. See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 448 (1964) (White, J., dissenting) (noting that "our courts customarily refuse to enforce the revenue and penal laws of a foreign state"); cf. *Milwaukee County* v. *M. E. White Co.*, 296 U. S. 268, 275–276 (1935). The Government argues, and the Court accepts, that domestic wire fraud prosecutions premised on violations of foreign tax law do not implicate the revenue rule because the court, while it must "recognize foreign [revenue] law to determine whether the defendant violated U. S. law," *ante*, at 369, need only "enforce" foreign law "in an attenuated sense." See *ante*, at 366; Brief for United States 17–19. As discussed above, however, the defendants' conduct arguably fell within the scope of § 1343 only because

of their purpose to evade Canadian customs and tax laws; shorn of that purpose, no other aspect of their conduct was criminal in this country. See *supra*, at 375–377; *Boots*, 80 F. 3d, at 587 ("[U]pholding defendants' section 1343 conviction would amount . . . to penal enforcement of Canadian customs and tax laws."). It seems to me unavoidably obvious, therefore, that this prosecution directly implicates the revenue rule. It is equally plain that Congress did not endeavor, by enacting § 1343, to displace that rule.

The application of the Mandatory Victims Restitution Act of 1996, 18 U. S. C. § 3663A, to wire fraud offenses is corroborative. Section 3663A applies to all "offense[s] against property," § 3663A(c)(1)(A)(ii), and directs that "[n]otwithstanding any other provision of law . . . the court *shall* order . . . that the defendant make restitution to the victim of the offense," § 3663A(a)(1) (emphasis added). The Government acknowledges, however, that it "did not urge the district court to order restitution in this case on the theory that it was not 'appropriate . . . since the victim is a foreign government and the loss derives from tax laws of the foreign government.'" Brief for United States 19–20 (quoting Letter from United States Attorney S. Schenning to United States District Chief Judge J. Motz, Feb. 16, 2001, App. 106). The Government now disavows this concession. See Tr. of Oral Arg. 36 (While "the prosecutor did concede below that restitution was not appropriately ordered," it is in fact "[t]he position of the United States . . . that restitution under the mandatory statute should be ordered and it does not infringe the revenue rule."). Nevertheless, the very fact that the Government effectively invited the District Court to overlook the mandatory restitution statute out of concern for the revenue rule is revealing. It further demonstrates that the Government's expansive reading of § 1343 warrants this Court's disapprobation.

Any tension between § 3663A and the wire fraud statute, the Government suggests and the Court accepts, would be

relieved if this Court construed § 3663A to exclude restitution that might encounter a revenue rule shoal. See *ante*, at 365; Brief for United States 21. Congress, however, has expressed with notable clarity a policy of mandatory restitution in *all* wire fraud prosecutions. In contrast, Congress was "quite ambiguous" concerning § 1343's coverage of schemes to evade foreign taxes. Tr. of Oral Arg. 38. The Mandatory Victims Restitution Act, in my view, is an additional indicator that "Congress . . . [did not] envision foreign taxes to be the object of [a] scheme to defraud," *id.*, at 35–36, and I would construe § 1343 accordingly.

## III

Finally, the rule of lenity counsels against adopting the Court's interpretation of § 1343. It is a "close question" whether the wire fraud statute's prohibition of "any scheme . . . to defraud" includes schemes directed solely at defrauding foreign governments of tax revenues. See *id.*, at 33. We have long held that, when confronted with "two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally*, 483 U. S., at 359–360; see *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 221–222 (1952).

This interpretive guide is particularly appropriate here. Wire fraud is a predicate offense under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. § 1961(1) (2000 ed., Supp. II), and the money laundering statute, § 1956(c)(7)(A) (2000 ed.). See *Cleveland*, 531 U. S., at 25. A finding that particular conduct constitutes wire fraud therefore exposes certain defendants to the severe criminal penalties and forfeitures provided in both RICO, see § 1963 (2000 ed.), and the money laundering statute, § 1956(a), (b) (2000 ed. and Supp. II).

* * *

For the reasons stated, I would hold that § 1343 does not extend to schemes to evade foreign tax and customs laws. I would therefore reverse the judgment of the Court of Appeals.

Syllabus

# SMALL *v.* UNITED STATES

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 03–750. Argued November 3, 2004—Decided April 26, 2005

Petitioner Small was convicted in a Japanese court of trying to smuggle firearms and ammunition into that country. He served five years in prison and then returned to the United States, where he bought a gun. Federal authorities subsequently charged Small under 18 U. S. C. § 922(g)(1), which forbids "any person . . . *convicted in any court* of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess . . . any firearm." (Emphasis added.) Small pleaded guilty while reserving the right to challenge his conviction on the ground that his earlier conviction, being foreign, fell outside § 922(g)(1)'s scope. The Federal District Court and the Third Circuit rejected this argument.

*Held:* Section 922(g)(1)'s phrase "convicted in any court" encompasses only domestic, not foreign, convictions. Pp. 388–394.

(a) In considering the scope of the phrase "convicted in any court" it is appropriate to assume that Congress had domestic concerns in mind. This assumption is similar to the legal presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application, see, *e. g.*, *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 285. The phrase "convicted in any court" describes one necessary portion of the "gun possession" activity that is prohibited as a matter of domestic law. Moreover, because foreign convictions may include convictions for conduct that domestic laws would permit, *e. g.*, for engaging in economic conduct that our society might encourage, convictions from a legal system that are inconsistent with American understanding of fairness, and convictions for conduct that domestic law punishes far less severely, the key statutory phrase "convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" somewhat less reliably identifies dangerous individuals for the purposes of U. S. law where foreign convictions, rather than domestic convictions, are at issue. In addition, it is difficult to read the statute as asking judges or prosecutors to refine its definitional distinctions where foreign convictions are at issue. To somehow weed out inappropriate foreign convictions that meet the statutory definition is not consistent with the statute's language; it is not easy for those not versed in foreign laws to accomplish; and it would leave those previously convicted in a foreign court (say, of

economic crimes) uncertain about their legal obligations. These considerations provide a convincing basis for applying the ordinary assumption about the reach of domestically oriented statutes here. Thus, the Court assumes a congressional intent that the phrase "convicted in any court" applies domestically, not extraterritorially, unless the statutory language, context, history, or purpose shows the contrary. Pp. 388–391.

(b) There is no convincing indication to the contrary here. The statute's language suggests no intent to reach beyond domestic convictions. To the contrary, if read to include foreign convictions, the statute's language creates anomalies. For example, in creating an exception allowing gun possession despite a conviction for an antitrust or business regulatory crime, § 921(a)(20)(A) speaks of "Federal or State" antitrust or regulatory offenses. If the phrase "convicted in any court" generally refers only to domestic convictions, this language causes no problem. But if the phrase includes foreign convictions, the words "Federal or State" prevent the exception from applying where a *foreign* antitrust or regulatory conviction is at issue. Such illustrative examples suggest that Congress did not consider whether the generic phrase "convicted in any court" applies to foreign convictions. Moreover, the statute's legislative history indicates no intent to reach beyond domestic convictions. Although the statutory purpose of keeping guns from those likely to become a threat to society *does* offer some support for reading § 922(g)(1) to include foreign convictions, the likelihood that Congress, at best, paid no attention to the matter is reinforced by the empirical fact that, according to the Government, since 1968, there have been fewer than a dozen instances in which such a foreign conviction has served as a predicate for a felon-in-possession prosecution. Pp. 391–394.

333 F. 3d 425, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SOUTER, and GINSBURG, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA and KENNEDY, JJ., joined, *post*, p. 394. REHNQUIST, C. J., took no part in the decision of the case.

*Paul D. Boas* argued the cause for petitioner. With him on the briefs was *Stephen P. Halbrook*.

*Patricia A. Millett* argued the cause for the United States. With her on the brief were *Acting Solicitor General Clement, Assistant Attorney General Wray, Deputy Solicitor General Dreeben*, and *John A. Drennan*.

JUSTICE BREYER delivered the opinion of the Court.

The United States Criminal Code makes it

> "unlawful for any person . . . who has been *convicted in any court* of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess . . . any firearm." 18 U. S. C. § 922(g)(1) (emphasis added).

The question before us focuses upon the words "convicted in any court." Does this phrase apply only to convictions entered in any *domestic* court or to *foreign* convictions as well? We hold that the phrase encompasses only domestic, not foreign, convictions.

I

In 1994 petitioner, Gary Small, was convicted in a Japanese court of having tried to smuggle several pistols, a rifle, and ammunition into Japan. Small was sentenced to five years' imprisonment. 183 F. Supp. 2d 755, 757, n. 3 (WD Pa. 2002). After his release, Small returned to the United States, where he bought a gun from a Pennsylvania gun dealer. Federal authorities subsequently charged Small under the "unlawful gun possession" statute here at issue. 333 F. 3d 425, 426 (CA3 2003). Small pleaded guilty while reserving the right to challenge his conviction on the ground that his earlier conviction, being a foreign conviction, fell outside the scope of the illegal gun possession statute. The Federal District Court rejected Small's argument, as did the Court of Appeals for the Third Circuit. 183 F. Supp. 2d, at 759; 333 F. 3d, at 427, n. 2. Because the Circuits disagree about the matter, we granted certiorari. Compare *United States* v. *Atkins*, 872 F. 2d 94, 96 (CA4 1989) ("convicted in any court" includes foreign convictions); *United States* v. *Winson*, 793 F. 2d 754, 757–759 (CA6 1986) (same), with *United States* v. *Gayle*, 342 F. 3d 89, 95 (CA2 2003) ("convicted in any court" does not include foreign convictions); *United States* v. *Concha*, 233 F. 3d 1249, 1256 (CA10 2000) (same).

## II

### A

The question before us is whether the statutory reference "convicted in *any* court" includes a conviction entered in a *foreign* court. The word "any" considered alone cannot answer this question. In ordinary life, a speaker who says, "I'll see any film," may or may not mean to include films shown in another city. In law, a legislature that uses the statutory phrase "'any person'" may or may not mean to include "'persons'" outside "the jurisdiction of the state." See, *e. g.*, *United States* v. *Palmer*, 3 Wheat. 610, 631 (1818) (Marshall, C. J.) ("[G]eneral words," such as the word "'any,'" must "be limited" in their application "to those objects to which the legislature intended to apply them"); *Nixon* v. *Missouri Municipal League*, 541 U. S. 125, 132 (2004) ("'any'" means "different things depending upon the setting"); *United States* v. *Alvarez-Sanchez*, 511 U. S. 350, 357 (1994) ("[R]espondent errs in placing dispositive weight on the broad statutory reference to 'any' law enforcement officer or agency without considering the rest of the statute"); *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 15–16 (1981) (it is doubtful that the phrase "'any statute'" includes the very statute in which the words appear); *Flora* v. *United States*, 362 U. S. 145, 149 (1960) ("'[A]ny sum,'" while a "catchall" phrase, does not "define what it catches"). Thus, even though the word "any" demands a broad interpretation, see, *e. g.*, *United States* v. *Gonzales*, 520 U. S. 1, 5 (1997), we must look beyond that word itself.

In determining the scope of the statutory phrase we find help in the "commonsense notion that Congress generally legislates with domestic concerns in mind." *Smith* v. *United States*, 507 U. S. 197, 204, n. 5 (1993). This notion has led the Court to adopt the legal presumption that Congress ordinarily intends its statutes to have domestic, not extrater-

ritorial, application. See *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 285 (1949); see also *Palmer*, *supra*, at 631 ("The words 'any person or persons,' are broad enough to comprehend every human being" but are "limited to cases within the jurisdiction of the state"); *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 249–251 (1991). That presumption would apply, for example, were we to consider whether this statute prohibits unlawful gun possession abroad as well as domestically. And, although the presumption against extraterritorial application does not apply directly to this case, we believe a similar assumption is appropriate when we consider the scope of the phrase "convicted in any court" here.

For one thing, the phrase describes one necessary portion of the "gun possession" activity that is prohibited as a matter of domestic law. For another, considered as a group, foreign convictions differ from domestic convictions in important ways. Past foreign convictions for crimes punishable by more than one year's imprisonment may include a conviction for conduct that domestic laws would permit, for example, for engaging in economic conduct that our society might encourage. See, *e. g.*, Art. 153 of the Criminal Code of the Russian Soviet Federated Socialist Republic, in Soviet Criminal Law and Procedure 171 (H. Berman & J. Spindler transls. 2d ed. 1972) (criminalizing "Private Entrepreneurial Activity"); Art. 153, *id.*, at 172 (criminalizing "Speculation," which is defined as "the buying up and reselling of goods or any other articles for the purpose of making a profit"); cf., *e. g.*, Gaceta Oficial de la Republica de Cuba, ch. II, Art. 103, p. 68 (Dec. 30, 1987) (forbidding propaganda that incites against the social order, international solidarity, or the Communist state). They would include a conviction from a legal system that is inconsistent with an American understanding of fairness. See, *e. g.*, U. S. Dept. of State, Country Reports on Human Rights Practices for 2003, Submitted to the House Committee on International Relations and the Senate Committee on Foreign Relations, 108th Cong., 2d Sess., 702–705,

1853, 2023 (Joint Comm. Print 2004) (describing failures of "due process" and citing examples in which "the testimony of one man equals that of two women"). And they would include a conviction for conduct that domestic law punishes far less severely. See, *e. g.*, Singapore Vandalism Act, ch. 108, §§2, 3, III Statutes of Republic of Singapore, pp. 257–258 (imprisonment for up to three years for an act of vandalism). Thus, the key statutory phrase "convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" somewhat less reliably identifies dangerous individuals for the purposes of U. S. law where foreign convictions, rather than domestic convictions, are at issue.

In addition, it is difficult to read the statute as asking judges or prosecutors to refine its definitional distinctions where foreign convictions are at issue. To somehow weed out inappropriate foreign convictions that meet the statutory definition is not consistent with the statute's language; it is not easy for those not versed in foreign laws to accomplish; and it would leave those previously convicted in a foreign court (say, of economic crimes) uncertain about their legal obligations. Cf. 1 United States Sentencing Commission, Guidelines Manual §4A1.2(h) (Nov. 2004) ("[S]entences resulting from foreign convictions are not counted" as a "prior sentence" for criminal history purposes).

These considerations, suggesting significant differences between foreign and domestic convictions, do not dictate our ultimate conclusion. Nor do they create a "clear statement" rule, imposing upon Congress a special burden of specificity. See *post*, at 399 (THOMAS, J., dissenting). They simply convince us that we should apply an ordinary assumption about the reach of domestically oriented statutes here—an assumption that helps us determine Congress' intent where Congress likely did not consider the matter and where other indicia of intent are in approximate balance. Cf. *ibid.* We consequently assume a congressional intent that the phrase

"convicted in any court" applies domestically, not extraterritorially. But, at the same time, we stand ready to revise this assumption should statutory language, context, history, or purpose show the contrary.

B

We have found no convincing indication to the contrary here. The statute's language does not suggest any intent to reach beyond domestic convictions. Neither does it mention foreign convictions nor is its subject matter special, say, immigration or terrorism, where one could argue that foreign convictions would seem especially relevant. To the contrary, if read to include foreign convictions, the statute's language creates anomalies.

For example, the statute creates an exception that allows gun possession despite a prior conviction for an antitrust or business regulatory crime. 18 U. S. C. § 921(a)(20)(A). In doing so, the exception speaks of "Federal or State" antitrust or regulatory offenses. *Ibid.* If the phrase "convicted in any court" generally refers only to domestic convictions, this language causes no problem. But if "convicted in any court" includes foreign convictions, the words "Federal or State" prevent the exception from applying where a *foreign* antitrust or regulatory conviction is at issue. An individual convicted of, say, a Canadian antitrust offense could not lawfully possess a gun, Combines Investigation Act, 2 R. S. C. 1985, ch. C–34, §§ 61(6), (9), but a similar individual convicted of, say, a New York antitrust offense, could lawfully possess a gun.

For example, the statute specifies that predicate crimes include "a misdemeanor crime of domestic violence." 18 U. S. C. § 922(g)(9). Again, the language specifies that these predicate crimes include only crimes that are "misdemeanor[s] under Federal or State law." § 921(a)(33)(A). If "convicted in any court" refers only to domestic convictions, this language creates no problem. If the phrase also refers to

foreign convictions, the language creates an apparently senseless distinction between (covered) domestic relations misdemeanors committed within the United States and (uncovered) domestic relations misdemeanors committed abroad.

For example, the statute provides an enhanced penalty where unlawful gun possession rests upon three predicate convictions for a "serious drug offense." § 924(e)(1) (2000 ed., Supp. II). Again the statute defines the relevant drug crimes through reference to specific federal crimes and with the words "offense under State law." §§ 924(e)(2)(A)(i), (ii) (2000 ed.). If "convicted in any court" refers only to domestic convictions, this language creates no problem. But if the phrase also refers to foreign convictions, the language creates an apparently senseless distinction between drug offenses committed within the United States (potentially producing enhanced punishments) and similar offenses committed abroad (not producing enhanced punishments).

For example, the statute provides that offenses that are punishable by a term of imprisonment of up to two years, and characterized under state law as misdemeanors, are not predicate crimes. § 921(20). This exception is presumably based on the determination that such state crimes are not sufficiently serious or dangerous so as to preclude an individual from possessing a firearm. If "convicted in any court" refers only to domestic convictions, this language creates no problem. But if the phrase also refers to foreign convictions, the language creates another apparently senseless distinction between less serious crimes (misdemeanors punishable by more than one year's imprisonment) committed within the United States (not predicate crimes) and similar offenses committed abroad (predicate crimes). These illustrative examples taken together suggest that Congress did not consider whether the generic phrase "convicted in any court" applies to domestic as well as foreign convictions.

The statute's lengthy legislative history confirms the fact that Congress did not consider whether foreign convictions should or should not serve as a predicate to liability under the provision here at issue. Congress did consider a Senate bill containing language that would have restricted predicate offenses to domestic offenses. See S. Rep. No. 1501, 90th Cong., 2d Sess., 31 (1968) (defining predicate crimes in terms of "Federal" crimes "punishable by a term of imprisonment exceeding one year" and crimes "determined by the laws of the State to be a felony"). And the Conference Committee ultimately rejected this version in favor of language that speaks of those "convicted in any court of, a crime punishable by a term of imprisonment exceeding one year," § 928(g)(1). See H. R. Conf. Rep. No. 1956, 90th Cong., 2d Sess., 28–29 (1968). But the history does not suggest that this language change reflected a congressional view on the matter before us. Rather, the enacted version is simpler and it avoids potential difficulties arising out of the fact that States may define the term "felony" differently. And as far as the legislative history is concerned, these latter virtues of the new language fully explain the change. Thus, those who use legislative history to help discern congressional intent will see the history here as silent, hence a neutral factor, that simply confirms the obvious, namely, that Congress did not consider the issue. Others will not be tempted to use or to discuss the history at all. But cf. *post*, at 406 (THOMAS, J., dissenting).

The statute's purpose *does* offer some support for a reading of the phrase that includes foreign convictions. As the Government points out, Congress sought to "'keep guns out of the hands of those who have demonstrated that they may not be trusted to possess a firearm without becoming a threat to society.'" Brief for United States 16 (quoting *Dickerson* v. *New Banner Institute, Inc.*, 460 U. S. 103, 112 (1983)); see also *Lewis* v. *United States*, 445 U. S. 55, 60–62, 66 (1980); *Huddleston* v. *United States*, 415 U. S. 814, 824

(1974). And, as the dissent properly notes, *post*, at 402–403, one convicted of a serious crime abroad may well be as dangerous as one convicted of a similar crime in the United States.

The force of this argument is weakened significantly, however, by the empirical fact that, according to the Government, since 1968, there have probably been no more than "10 to a dozen" instances in which such a foreign conviction has served as a predicate for a felon-in-possession prosecution. Tr. of Oral Arg. 32. This empirical fact reinforces the likelihood that Congress, at best, paid no attention to the matter.

C

In sum, we have no reason to believe that Congress considered the added enforcement advantages flowing from inclusion of foreign crimes, weighing them against, say, the potential unfairness of preventing those with inapt foreign convictions from possessing guns. See *supra*, at 389. The statute itself and its history offer only congressional silence. Given the reasons for disfavoring an inference of extraterritorial coverage from a statute's total silence and our initial assumption against such coverage, see *supra*, at 390–391, we conclude that the phrase "convicted in any court" refers only to domestic courts, not to foreign courts. Congress, of course, remains free to change this conclusion through statutory amendment.

For these reasons, the judgment of the Third Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

THE CHIEF JUSTICE took no part in the decision of this case.

JUSTICE THOMAS, with whom JUSTICE SCALIA and JUSTICE KENNEDY join, dissenting.

Gary Small, having recently emerged from three years in Japanese prison for illegally importing weapons into that

country, bought a gun in the United States. This violated 18 U. S. C. § 922(g)(1), which makes it unlawful for any person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year" to possess a firearm in or affecting commerce. Yet the majority decides that Small's gun possession did not violate the statute, because his prior convictions occurred in a Japanese court rather than an American court. In concluding that "any" means not what it says, but rather "a subset of any," the Court distorts the plain meaning of the statute and departs from established principles of statutory construction. I respectfully dissent.

I

In December 1992, Small shipped a 19-gallon electric water heater from the United States to Okinawa, Japan, ostensibly as a present for someone in Okinawa. App. to Brief for Appellant in No. 02–2785 (CA3), pp. 507a–510a, 530a–531a, 534a, 598a (hereinafter Appellant's App.). Small had sent two other water heaters to Japan that same year. *Id.*, at 523a–527a. Thinking it unusual for a person to ship a water tank from overseas as a present, *id.*, at 599a, Japanese customs officials searched the heater and discovered 2 rifles, 8 semiautomatic pistols, and 410 rounds of ammunition, *id.*, at 603a–604a; *id.*, at 262a, 267a, 277a.

The Japanese Government indicted Small on multiple counts of violating Japan's weapons-control and customs laws. *Id.*, at 261a–262a. Each offense was punishable by imprisonment for a term exceeding one year. 333 F. 3d 425, 426 (CA3 2003). Small was tried before a three-judge court in Naha, Japan, Appellant's App. 554a, convicted on all counts on April 14, 1994, 333 F. 3d, at 426, and sentenced to 5 years' imprisonment with credit for 320 days served, *id.*, at 426, n. 1; Government's Brief in Support of Detention in Crim. No. 00–160 (WD Pa.), pp. 3–4. He was paroled on November 22, 1996, and his parole terminated on May 26, 1998. 333 F. 3d, at 426, n. 1.

A week after completing parole for his Japanese convictions, on June 2, 1998, Small purchased a 9-millimeter SWD Cobray pistol from a firearms dealer in Pennsylvania. Appellant's App. 48a, 98a. Some time later, a search of his residence, business premises, and automobile revealed a .380-caliber Browning pistol and more than 300 rounds of ammunition. *Id.*, at 47a–51a, 98a–99a. This prosecution ensued.

II

The plain terms of § 922(g)(1) prohibit Small—a person "convicted in any court of, a crime punishable by imprisonment for a term exceeding one year"—from possessing a firearm in the United States. "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 520 U. S. 1, 5 (1997) (quoting Webster's Third New International Dictionary 97 (1976) (hereinafter Webster's 3d)); see also *Department of Housing and Urban Development* v. *Rucker*, 535 U. S. 125, 130–131 (2002) (statute making "any" drug-related criminal activity cause for termination of public housing lease precludes requirement that tenant know of the activity); *Brogan* v. *United States*, 522 U. S. 398, 400–401 (1998) (statute criminalizing "any" false statement within the jurisdiction of a federal agency allows no exception for the mere denial of wrongdoing); *United States* v. *Alvarez-Sanchez*, 511 U. S. 350, 356, 358 (1994) (statute referring to "any" law enforcement officer includes all law enforcement officers—federal, state, or local—capable of arresting for a federal crime). No exceptions appear on the face of the statute; "[n]o modifier is present, and nothing suggests any restriction," *Lewis* v. *United States*, 445 U. S. 55, 60 (1980), on the scope of the term "court." See *Gonzales*, *supra*, at 5 (statute referring to "'any other term of imprisonment'" includes no "language limiting the breadth of that word, and so we must read [the statute] as referring to all 'term[s] of

imprisonment'"). The broad phrase "any court" unambiguously includes all judicial bodies[1] with jurisdiction to impose the requisite conviction—a conviction for a crime punishable by imprisonment for a term of more than a year. Indisputably, Small was convicted in a Japanese court of crimes punishable by a prison term exceeding one year. The clear terms of the statute prohibit him from possessing a gun in the United States.

Of course, the phrase "any court," like all other statutory language, must be read in context. *E. g., Deal* v. *United States*, 508 U. S. 129, 132 (1993). The context of § 922(g)(1), however, suggests that there is no geographic limit on the scope of "any court."[2] By contrast to other parts of the firearms-control law that expressly mention only state or federal law, "any court" is not qualified by jurisdiction. See 18 U. S. C. § 921(a)(20) (excluding certain "Federal or State offenses" from the definition of "crime punishable by imprisonment for a term exceeding one year"); § 921(a)(33)(A)(i) (defining a "misdemeanor crime of domestic violence" by

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[1] See, *e. g.*, The Random House Dictionary of the English Language 335 (1966) (defining "court" as "a place where justice is administered," "a judicial tribunal duly constituted for the hearing and determination of cases," "a session of a judicial assembly"); The Concise Oxford Dictionary of Current English 282 (5th ed. 1964) (defining "court" as an "[a]ssembly of judges or other persons acting as tribunal"); Webster's 3d 522 (1961) (defining "court" as "the persons duly assembled under authority of law for the administration of justice," "an official assembly legally met together for the transaction of judicial business," "a judge or judges sitting for the hearing or trial of cases").

[2] The Court's observation that "a speaker who says, 'I'll see any film,' may or may not mean to include films shown in another city," *ante*, at 388, therefore adds nothing to the analysis. The context of that statement implies that such a speaker, despite saying "any," often means only the subset of films within an accessible distance. Unlike the context of the film remark, the context of 18 U. S. C. § 922(g)(1) implies no geographic restriction.

reference to "Federal or State law").[3] Congress' explicit use of "Federal" and "State" in other provisions shows that it specifies such restrictions when it wants to do so.

Counting foreign convictions, moreover, implicates no special federalism concerns or other clear statement rules that have justified construing "any" narrowly in the past.[4] And it is eminently practical to put foreign convictions to the same use as domestic ones; foreign convictions indicate dangerousness just as reliably as domestic convictions. See Part III–B, *infra*. The expansive phrase "convicted in any court" straightforwardly encompasses Small's Japanese convictions.

## III

Faced with the inescapably broad text, the Court narrows the statute by assuming that the text applies only to domestic convictions, *ante*, at 388–389; criticizing the accuracy of foreign convictions as a proxy for dangerousness, *ante*, at 389–390; finding that the broad, natural reading of the statute "creates anomalies," *ante*, at 391; and suggesting that Congress did not consider whether foreign convictions counted, *ante*, at 393. None of these arguments is persuasive.

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[3] See also § 921(a)(15) (defining a "fugitive from justice," who is banned from possessing firearms under § 922(g)(2), as "any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony"); § 924(e)(2) (defining a "serious drug offense," which can trigger an enhanced sentence, by reference to particular federal laws or "State law").

[4] *Nixon* v. *Missouri Municipal League*, 541 U. S. 125 (2004), considered a federal statute authorizing pre-emption of state and local laws "prohibiting the ability of any entity" to provide telecommunications services. *Id.*, at 128 (internal quotation marks omitted). The Court held that the statute did not provide the clear statement required for the Federal Government to limit the States' ability to restrict delivery of such services by their own political subdivisions. *Id.*, at 140–141; see also *id.*, at 141 (SCALIA, J., concurring in judgment); *Raygor* v. *Regents of Univ. of Minn.*, 534 U. S. 533, 540–541 (2002) ("any" in federal statute insufficiently clear statement to abrogate state sovereign immunity); *Atascadero State Hospital* v. *Scanlon*, 473 U. S. 234, 245–246 (1985) (same). No such clear statement rule is at work here.

A

The Court first invents a canon of statutory interpretation—what it terms "an ordinary assumption about the reach of domestically oriented statutes," *ante*, at 390—to cabin the statute's reach. This new "assumption" imposes a clear statement rule on Congress: Absent a clear statement, a statute refers to nothing outside the United States. The Court's denial that it has created a clear statement rule is implausible. *Ibid.* After today's ruling, the only way for Congress to ensure that courts will construe a law to refer to foreign facts or entities is to describe those facts or entities specifically as foreign. If this is not a "special burden of specificity," *ibid.*, I am not sure what is.

The Court's innovation is baseless. The Court derives its assumption from the entirely different, and well-recognized, canon against extraterritorial application of federal statutes: "It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 248 (1991) (internal quotation marks omitted). But the majority rightly concedes that the canon against extraterritoriality itself "does not apply directly to this case." *Ante*, at 389. Though foreign as well as domestic convictions trigger § 922(g)(1)'s prohibition, the statute criminalizes gun possession in this country, not abroad. In prosecuting Small, the Government is enforcing a domestic criminal statute to punish domestic criminal conduct. *Pasquantino* v. *United States*, *ante*, at 371–372 (federal wire fraud statute covers a domestic scheme aimed at defrauding a foreign government of tax revenue).

The extraterritoriality cases cited by the Court, *ante*, at 389, do not support its new assumption. They restrict federal statutes from applying outside the territorial jurisdiction of the United States. See *Smith* v. *United States*, 507 U. S. 197, 203–204 (1993) (Federal Tort Claims Act does not apply to claims arising in Antarctica); *Arabian American*

*Oil Co., supra*, at 249–251 (Title VII of the Civil Rights Act of 1964 does not regulate the employment practices of American firms employing American citizens abroad); *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 285–286 (1949) (federal labor statute does not apply to a contract between the United States and a private contractor for construction work done in a foreign country); *United States* v. *Palmer*, 3 Wheat. 610, 630–634 (1818) (statute punishing piracy on the high seas does not apply to robbery committed on the high seas by a noncitizen on board a ship belonging exclusively to subjects of a foreign state). These straightforward applications of the extraterritoriality canon, restricting federal statutes from reaching conduct *beyond U. S. borders*, lend no support to the Court's unprecedented rule restricting a federal statute from reaching conduct *within U. S. borders*.

We have, it is true, recognized that the presumption against extraterritorial application of federal statutes is rooted in part in the "commonsense notion that Congress generally legislates with domestic concerns in mind." *Smith, supra*, at 204, n. 5. But my reading of § 922(g)(1) is entirely true to that notion: Gun possession in this country is surely a "domestic concern." We have also consistently grounded the canon in the risk that extraterritorially applicable U. S. laws could conflict with foreign laws, for example, by subjecting individuals to conflicting obligations. *Arabian American Oil Co., supra*, at 248. That risk is completely absent in applying § 922(g)(1) to Small's conduct. Quite the opposite, § 922(g)(1) takes foreign law as it finds it. Aside from the extraterritoriality canon, which the Court properly concedes does not apply, I know of no principle of statutory construction justifying the result the Court reaches. Its concession that the canon is inapposite should therefore end this case.

Rather than stopping there, the Court introduces its new "assumption about the reach of domestically oriented stat-

utes" *sua sponte*, without briefing or argument on the point,[5] and without providing guidance on what constitutes a "domestically oriented statut[e]." *Ante*, at 390. The majority suggests that it means all statutes except those dealing with subjects like "immigration or terrorism," *ante*, at 391, apparently reversing our previous rule that the extraterritoriality canon "has special force" in statutes "that may involve foreign and military affairs," *Sale* v. *Haitian Centers Council, Inc.*, 509 U. S. 155, 188 (1993) (provision of the Immigration and Nationality Act does not apply extraterritorially); cf. *Palmer*, *supra* (statute criminalizing piracy on the high seas does not apply to robbery by noncitizen on ship belonging to foreign subjects). The Court's creation threatens to wreak havoc with the established rules for applying the canon against extraterritoriality.[6]

B

In support of its narrow reading of the statute, the majority opines that the natural reading has inappropriate results. It points to differences between foreign and domestic convictions, primarily attacking the reliability of foreign convictions as a proxy for identifying dangerous individuals. *Ante*, at 389–390. Citing various foreign laws, the Court observes that, if interpreted to include foreign convictions, § 922(g) would include convictions for business and speech activities "that [United States] laws would permit," *ante*, at 389; convictions "from a legal system that is inconsistent with an American understanding of fairness," *ibid.*; and con-

[5] Neither party mentions the quasi-extraterritoriality principle that the Court fashions. The briefs barely discuss the extraterritoriality canon itself. The only reference to that canon is a footnote in the Government's brief pointing out that it is inapposite. Brief for United States 44, n. 31.

[6] The Court attempts to justify applying its new canon with the claim that "other indicia of intent are in approximate balance." *Ante*, at 390. This claim is false. Other indicia of intent are not in balance, so long as text counts as an indicium of intent. As I have explained, Part II, *supra*, the text of § 922(g)(1) encompasses foreign convictions.

victions "for conduct that [United States] law punishes far less severely," *ante*, at 390. The Court therefore concludes that foreign convictions cannot trigger § 922(g)(1)'s prohibition on firearm possession.

The Court's claim that foreign convictions punishable by imprisonment for more than a year "somewhat less reliably identif[y] dangerous individuals" than domestic convictions, *ibid.*, is untenable. In compiling examples of foreign convictions that might trigger § 922(g)(1), *ante*, at 389–390, the Court constructs a parade of horribles. Citing laws of the Russian Soviet Federated Socialist Republic, Cuba, and Singapore, it cherry-picks a few egregious examples of convictions unlikely to correlate with dangerousness, inconsistent with American intuitions of fairness, or punishable more severely than in this country. *Ibid.* This ignores countless other foreign convictions punishable by more than a year that serve as excellent proxies for dangerousness and culpability.[7] Surely a "reasonable human being" drafting this language would have considered whether foreign convictions are, on average and as a whole, accurate at gauging dangerousness and culpability, not whether the worst-of-the-worst are. Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845, 854 (1992). The Court also ignores the facts of this very case: A week after

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[7] Brottsbalk (Swedish Criminal Code), SFS 1962:700, ch. 3, § 1 (murder); Criminal Code of Canada, 2 R. S. C. 1985, ch. C–46, § 244(b), as amended (discharging firearm at a person with intent to endanger life); § 102(2) (making an automatic weapon); Laws of the State of Israel, Penal Law § 345(b)(2) (rape by threat of firearm or cutting weapon); Penal Code of Egypt Art. 143 (giving weapons to a detained person in order to help him escape); Federal Penal Code of Mexico Art. 139 (terrorism by explosives, toxic substances, firearms, fire, flooding, or other violent means); Art. 163 (kidnaping); Firearms Offenses Act 1968 (United Kingdom), ch. 27, § 18(1) (carrying firearm with intent to commit an indictable offense or to resist arrest); 7 Laws of the Republic of Zambia Cap. 87, ch. 19, §§ 200–201 (1995) (murder); ch. 24, § 248 (assault occasioning actual bodily harm); ch. 25, §§ 251–262 (kidnaping, abduction, and buying or selling slaves).

completing his sentence for shipping two rifles, eight semiautomatic pistols, and hundreds of rounds of ammunition into Japan, Small bought a gun in this country. It was eminently reasonable for Congress to use convictions punishable by imprisonment for more than a year—foreign no less than domestic—as a proxy for dangerousness.

Contrary to the majority's assertion, it makes sense to bar people convicted overseas from possessing guns in the United States. The Court casually dismisses this point with the observation that only "'10 to a dozen'" prosecutions under the statute have involved foreign convictions as predicate convictions. *Ante*, at 394 (quoting Tr. of Oral Arg. 32). The rarity of such prosecutions, however, only refutes the Court's simultaneous claim, *ante*, at 389–390, that a parade of horribles will result if foreign convictions count. Moreover, the Court does not claim that any of these few prosecutions has been based on a foreign conviction inconsistent with American law. As far as anyone is aware, the handful of prosecutions thus far rested on foreign convictions perfectly consonant with American law, like Small's conviction for international gunrunning. The Court has no answer for why including foreign convictions is unwise, let alone irrational.

C

The majority worries that reading § 922(g)(1) to include foreign convictions "creates anomalies" under other firearms-control provisions. *Ante*, at 391–392. It is true, as the majority notes, that the natural reading of § 922(g)(1) affords domestic offenders more lenient treatment than foreign ones in some respects: A domestic antitrust or business regulatory offender could possess a gun, while a similar foreign offender could not; the perpetrator of a state misdemeanor punishable by two years or less in prison could possess a gun, while an analogous foreign offender could not. *Ibid.* In other respects, domestic offenders would receive harsher treatment than their foreign counterparts: One who

committed a misdemeanor crime of domestic violence in the United States could not possess a gun, while a similar foreign offender could; and a domestic drug offender could receive a 15-year mandatory minimum sentence for unlawful gun possession, while a foreign drug offender could not. *Ibid.*

These outcomes cause the Court undue concern. They certainly present no occasion to employ, nor does the Court invoke, the canon against absurdities. We should employ that canon only "where the result of applying the plain language would be, in a genuine sense, absurd, *i. e.*, where it is quite impossible that Congress could have intended the result . . . and where the alleged absurdity is so clear as to be obvious to most anyone." *Public Citizen* v. *Department of Justice*, 491 U. S. 440, 470–471 (1989) (KENNEDY, J., concurring in judgment); *Nixon* v. *Missouri Municipal League*, 541 U. S. 125, 141 (2004) (SCALIA, J., concurring in judgment) ("avoidance of unhappy consequences" is inadequate basis for interpreting a text); cf. *Sturges* v. *Crowninshield*, 4 Wheat. 122, 203 (1819) (before disregarding the plain meaning of a constitutional provision, the case "must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application").

Here, the "anomalies" to which the Court points are not absurd. They are, at most, odd; they may even be rational. For example, it is not senseless to bar a Canadian antitrust offender from possessing a gun in this country, while exempting a domestic antitrust offender from the ban. Congress might have decided to proceed incrementally and exempt only antitrust offenses with which it was familiar, namely, domestic ones. In any event, the majority abandons the statute's plain meaning based on results that are at most incongruous and certainly not absurd. As with the extraterritoriality canon, the Court applies a mutant version of a recognized canon when the recognized canon is itself inappo-

site. Whatever the utility of canons as guides to congressional intent, they are useless when modified in ways that Congress could never have imagined in enacting § 922(g)(1).

Even assuming that my reading of the statute generates anomalies, the majority's reading creates ones even more dangerous. As explained above, the majority's interpretation permits those convicted overseas of murder, rape, assault, kidnaping, terrorism, and other dangerous crimes to possess firearms freely in the United States. *Supra*, at 402–403, and n. 7. Meanwhile, a person convicted domestically of tampering with a vehicle identification number, 18 U. S. C. § 511(a)(1), is barred from possessing firearms. The majority's concern with anomalies provides no principled basis for choosing its interpretation of the statute over mine.

D

The Court hypothesizes "that Congress did not consider whether the generic phrase 'convicted in any court' applies to domestic as well as foreign convictions," *ante*, at 392, and takes that as license to restrict the clear breadth of the text. Whether the Court's empirical assumption is correct is anyone's guess. Regardless, we have properly rejected this method of guesswork-as-interpretation. In *Beecham* v. *United States*, 511 U. S. 368 (1994), we interpreted other provisions of the federal firearms laws to mean that a person convicted of a federal crime is not relieved of the firearms disability unless his civil rights have been restored under federal (as opposed to state) law. We acknowledged the possibility "that the phrases on which our reading of the statute turns . . . were accidents of statutory drafting," *id.*, at 374; and we observed that some legislators might have read the phrases differently from the Court's reading, "or, more likely, . . . never considered the matter at all," *ibid.* We nonetheless adhered to the unambiguous meaning of the statute. *Ibid.*; cf. *National Organization for Women, Inc.* v. *Scheidler*, 510 U. S. 249, 262 (1994) ("The fact that [the

Racketeer Influenced and Corrupt Organizations Act] has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth" (internal quotation marks and brackets omitted)). Here, as in *Beecham*, "our task is not the hopeless one of ascertaining what the legislators who passed the law would have decided had they reconvened to consider [this] particular cas[e]," 511 U. S., at 374, but the eminently more manageable one of following the ordinary meaning of the text they enacted. That meaning includes foreign convictions.

The Court's reliance on the absence of any discussion of foreign convictions in the legislative history is equally unconvincing. *Ante*, at 393. Reliance on explicit statements in the history, if they existed, would be problematic enough. Reliance on silence in the history is a new and even more dangerous phenomenon. *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U. S. 50, 73 (2004) (SCALIA, J., dissenting) (criticizing the Court's novel "Canon of Canine Silence").

I do not even agree, moreover, that the legislative history is silent. As the Court describes, the Senate bill that formed the basis for this legislation was amended in Conference, to change the predicate offenses from "'Federal' crimes" punishable by more than one year's imprisonment and "crimes 'determined by the laws of a State to be a felony'" to conviction "'in any court of, a crime punishable by a term of imprisonment exceeding one year.'" *Ante*, at 393. The Court seeks to explain this change by saying that "the enacted version is simpler and . . . avoids potential difficulties arising out of the fact that States may define the term 'felony' differently." *Ibid.* But that does not explain why all limiting reference to "Federal" and "State" was eliminated. The revised provision would have been just as simple, and would just as well have avoided the potential difficulties, if it read "convicted in any Federal or State court of a crime punishable by a term of imprisonment exceeding one year." Surely that would have been the natural change if

expansion beyond federal and state convictions were not intended. The elimination of the limiting references suggests that not *only* federal and state convictions were meant to be covered.

Some, of course, do not believe that any statement or text that has not been approved by both Houses of Congress and the President (if he signed the bill) is an appropriate source of statutory interpretation. But for those who do, this committee change ought to be strong confirmation of the fact that "any" means not "any Federal or State," but simply "any."

## IV

The Court never convincingly explains its departure from the natural meaning of § 922(g)(1). Instead, it institutes the troubling rule that "any" does not really mean "any," but may mean "some subset of 'any,'" even if nothing in the context so indicates; it distorts the established canons against extraterritoriality and absurdity; it faults without reason Congress' use of foreign convictions to gauge dangerousness and culpability; and it employs discredited methods of determining congressional intent. I respectfully dissent.

Syllabus

# PACE *v.* DiGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 03–9627. Argued February 28, 2005—Decided April 27, 2005

After the Pennsylvania Superior Court found petitioner's state postconviction petition untimely under the Pennsylvania Post Conviction Relief Act (PCRA) and the State Supreme Court denied review, petitioner sought federal habeas. The District Court refused to dismiss the petition under the Antiterrorism and Effective Death Penalty Act of 1996's (AEDPA) statute of limitations, finding that petitioner was entitled to both statutory and equitable tolling while his PCRA petition was pending even though that petition was untimely under state law. Reversing, the Third Circuit held, with regard to statutory tolling, that an untimely PCRA petition is not "a properly filed application for State postconviction or other collateral review" that tolls AEDPA's limitations period under 28 U. S. C. § 2244(d)(2), and that there were no extraordinary circumstances justifying equitable tolling.

*Held:* Because petitioner filed his federal habeas petition beyond the deadline and is not entitled to statutory or equitable tolling for any of that time period, his federal petition is barred by AEDPA's statute of limitations. Pp. 413–419.

(a) Petitioner is not entitled to statutory tolling. When this Court held in *Artuz* v. *Bennett*, 531 U. S. 4, 8, 11, that time limits on postconviction petitions are "condition[s] to filing," such that an untimely petition would not be deemed "properly filed," it reserved the question "whether the existence of certain exceptions to a timely filing requirement can prevent a late application from being considered improperly filed," *id.*, at 8, n. 2. There are no grounds for treating the two differently. Under the common understanding of "properly filed" that guided the *Artuz* Court, a petition filed after a time limit, which does not fit within any exceptions to that limit, is no more "properly filed" than a petition filed after a time limit permitting no exception. This commonsense reading is confirmed by the purpose of AEDPA's statute of limitations and is supported by *Carey* v. *Saffold*, 536 U. S. 214. Petitioner's counterarguments—that "condition[s] to filing" are merely those conditions necessary to get a clerk to accept the petition, not conditions requiring judicial consideration; that a condition that must be applied on

Syllabus

a claim-by-claim basis cannot be a "condition to filing"; and that this Court's interpretation is unfair to petitioners who try in good faith to exhaust their state remedies—are rejected. *Artuz* does not require a different result. There is an obvious distinction between time limits, which go to the very initiation of a petition and a court's ability to consider that petition, and the type of rule-of-decision procedural bars at issue in *Artuz*, which go to the ability to obtain relief. Pp. 413–417.

(b) Because petitioner waited for years after his claims became available to file his PCRA petition and five more months once his PCRA proceedings became final before seeking relief in federal court, he has not established that he pursued his claims diligently. Thus, assuming equitable tolling applies here, he is not entitled to equitable tolling. See, *e. g.*, *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 96. Pp. 418–419.

71 Fed. Appx. 127, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post*, p. 419.

*David W. Wycoff* argued the cause for petitioner. With him on the briefs were *Billy H. Nolas* and *Maureen Kearney Rowley.*

*Ronald Eisenberg* argued the cause for respondents. With him on the brief were *Thomas W. Dolgenos, John W. Goldsborough, Arnold H. Gordon,* and *Lynne Abraham.**

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**Peter Goldberger, David Richman, Joseph Farber,* and *David M. Porter* filed a brief for the National Association of Criminal Defense Lawyers et al. as *amici curiae* urging reversal.

A brief of *amici curiae* urging affirmance was filed for the State of Alabama et al. by *Troy King,* Attorney General of Alabama, and *Stephanie N. Morman,* Deputy Solicitor General, by *John W. Suthers,* Interim Attorney General of Colorado, and *Christopher L. Morano,* Chief State's Attorney of Connecticut, and by the Attorneys General for their respective States as follows: *Mike Beebe* of Arkansas, *M. Jane Brady* of Delaware, *Thurbert E. Baker* of Georgia, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Thomas J. Miller* of Iowa, *Phill Kline* of Kansas, *G. Steven Rowe* of Maine, *J. Joseph Curran, Jr.,* of Maryland, *Michael A. Cox* of Michigan, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Jim Petro* of Ohio,

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The federal Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) establishes a 1-year statute of limitations for filing a federal habeas corpus petition. 28 U. S. C. § 2244(d)(1). That limitations period is tolled, however, while "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." § 2244(d)(2). This case requires us to decide whether a state postconviction petition rejected by the state court as untimely nonetheless is "properly filed" within the meaning of § 2244(d)(2). We conclude that it is not, and hold that petitioner John Pace's federal petition is time barred.

In February 1986, petitioner pleaded guilty to second-degree murder and possession of an instrument of crime in a Pennsylvania state court. He was sentenced to life in prison without the possibility of parole. Petitioner did not file a motion to withdraw his guilty plea, and he did not file a direct appeal. In August 1986, he filed a petition under the Pennsylvania Post Conviction Hearing Act (PCHA), 42 Pa. Cons. Stat. § 9541 *et seq.* (1988) (amended and renamed by Act No. 1988–47, §§ 3, 6, 1988 Pa. Laws pp. 337–342). These proceedings concluded in September 1992, when the Pennsylvania Supreme Court denied petitioner's untimely request for discretionary review.

Over four years later, on November 27, 1996, petitioner filed another state postconviction petition, this time under the Pennsylvania Post Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. § 9541 *et seq.* (1998). The PCRA had replaced the PCHA in 1988 and was amended in 1995 to include, for the first time, a statute of limitations for state postconviction

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*W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Thomas W. Corbett, Jr.*, of Pennsylvania, *Paul G. Summers* of Tennessee, *Greg Abbott* of Texas, *Jerry W. Kilgore* of Virginia, *Rob McKenna* of Washington, and *Patrick J. Crank* of Wyoming.

petitions, with three exceptions.[1] Although petitioner's PCRA petition was filed after the date upon which the new time limits became effective, the petition said nothing about timeliness.

After reviewing petitioner's PCRA petition, appointed counsel submitted a "no-merit" letter. On July 23, 1997, the Court of Common Pleas dismissed the petition, without calling for a response from the Commonwealth. The court noted that petitioner's claims previously had been litigated and were meritless. Petitioner appealed. On May 6, 1998, the Commonwealth filed a brief in response, asserting that petitioner's PCRA petition was untimely under the PCRA's time bar, § 9545(b), and citing as support *Commonwealth* v. *Alcorn*, 703 A. 2d 1054 (Pa. Super. 1997). On May 28, 1998, petitioner responded by arguing that the time limit was inapplicable to him. The Superior Court dismissed his petition as untimely on December 3, 1998. The Superior Court reasoned that petitioner's PCRA petition did not come within the statutory note following § 9545(b), see *ibid.*, and that petitioner had "neither alleged nor proven" that he fell within any statutory exception, see §§ 9545(b)(1)(i)–(iii). App. 316–317. The Pennsylvania Supreme Court denied review on July 29, 1999. *Id.*, at 372.

On December 24, 1999, petitioner filed a federal habeas petition under 28 U. S. C. § 2254 in the District Court for the

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[1] The amended statute states that "[a]ny" postconviction petition, "including a second or subsequent petition, shall be filed within one year" from the date the petitioner's conviction becomes final. 42 Pa. Cons. Stat. § 9545(b)(1) (1998). However, three exceptions are provided: if governmental interference prevented filing; if a new constitutional rule is made retroactive; or if new facts arise that could not have been discovered through due diligence. §§ 9545(b)(1)(i)–(iii). A statutory note provides that the 1995 amendments "shall apply to petitions filed after [January 16, 1996]; however, a petitioner whose judgment has become final on or before [January 16, 1996] shall be deemed to have filed a timely petition . . . if the petitioner's first petition is filed within one year of [January 16, 1996]." Statutory Note on § 9545(b).

Eastern District of Pennsylvania. The Magistrate Judge recommended dismissal of the petition under AEDPA's statute of limitations, § 2244(d)(1), but the District Court rejected that recommendation, App. 447–466 (June 7, 2001, memorandum and order), 503–533 (Mar. 29, 2002, memorandum and order). The District Court recognized that, without tolling, petitioner's petition was time barred.[2] But it held that petitioner was entitled to both statutory and equitable tolling for the time during which his PCRA petition was pending—November 27, 1996 to July 29, 1999. Beginning with statutory tolling, the District Court held that, even though the state court rejected his PCRA petition as untimely, that did not prevent the petition from being "properly filed" within the meaning of § 2244(d)(2). It reasoned that because the PCRA set up judicially reviewable exceptions to the time limit, the PCRA time limit was not a "condition to filing" but a "condition to obtaining relief" as we described those distinct concepts in *Artuz* v. *Bennett*, 531 U. S. 4, 11 (2000). The District Court alternatively found extraordinary circumstances justifying equitable tolling.

The Court of Appeals for the Third Circuit reversed. *Pace* v. *Vaughn*, 71 Fed. Appx. 127 (2003) (not precedential). With regard to *statutory* tolling, it relied on a line of Third Circuit cases to conclude that the PCRA time limit constitutes a "condition to filing" and that, when a state court deems a petition untimely, it is not "properly filed." *Id.*, at 128. With regard to *equitable* tolling, it held that there were not extraordinary circumstances justifying that remedy. *Id.*, at 129. Because Circuits have divided over whether a state postconviction petition that the state court

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[2] The District Court noted that, under Third Circuit precedent, "petitioners whose convictions became final before the enactment of AEDPA's statute of limitations on April 24, 1996 have until one year from the enactment of the habeas statute of limitations to file their petitions." App. 453, 503. Without tolling, therefore, petitioner's federal habeas petition was filed well after the April 1997 deadline.

has rejected as untimely nonetheless may be "properly filed," we granted certiorari.[3] 542 U. S. 965 (2004). We now affirm.

In *Artuz* v. *Bennett*, *supra*, we held that time limits on postconviction petitions are "condition[s] to filing," such that an untimely petition would not be deemed "properly filed." *Id.*, at 8, 11 ("[A]n application is '*properly* filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings" including "time limits upon its delivery"). However, we reserved the question we face here: "whether the existence of certain exceptions to a timely filing requirement can prevent a late application from being considered improperly filed." *Id.*, at 8, n. 2. Having now considered the question, we see no grounds for treating the two differently.

As in *Artuz*, we are guided by the "common usage" and "commo[n] underst[anding]" of the phrase "properly filed." *Id.*, at 8, 9. In common understanding, a petition filed after a time limit, and which does not fit within any exceptions to that limit, is no more "properly filed" than a petition filed after a time limit that permits no exception. The purpose of AEDPA's statute of limitations confirms this commonsense reading. On petitioner's theory, a state prisoner could toll the statute of limitations at will simply by filing untimely state postconviction petitions. This would turn § 2244(d)(2) into a *de facto* extension mechanism, quite contrary to the purpose of AEDPA, and open the door to abusive delay.

*Carey* v. *Saffold*, 536 U. S. 214 (2002), points to the same conclusion. In *Saffold*, we considered whether § 2244(d)(2) required tolling during the 4½ months between the California appellate court's denial of Saffold's postconviction petition and his further petition in the California Supreme Court. The California Supreme Court denied the petition "on the merits and for lack of diligence," which raised the

[3] Compare, *e. g.*, *Dictado* v. *Ducharme*, 244 F. 3d 724, 726–728 (CA9 2001), with *Merritt* v. *Blaine*, 326 F. 3d 157, 162–168 (CA3 2003).

question whether that court had dismissed for lack of merit, for untimeliness, or for both. *Id.*, at 225 (internal quotation marks omitted). Although we ultimately remanded, we explained that, "[i]f the California Supreme Court had clearly ruled that Saffold's 4½-month delay was 'unreasonable,'" *i. e.*, untimely, "*that would be the end of the matter*, regardless of whether it also addressed the merits of the claim, or whether its timeliness ruling was 'entangled' with the merits." *Id.*, at 226 (emphasis added); see also *id.*, at 236 (KENNEDY, J., dissenting) ("If the California court held that all of [Saffold's] state habeas petitions were years overdue, then they were not 'properly filed' at all, and there would be no tolling of the federal limitations period"). What we intimated in *Saffold* we now hold: When a postconviction petition is untimely under state law, "that [is] the end of the matter" for purposes of § 2244(d)(2).

Petitioner makes three principal arguments against this reading. First, he asserts that "condition[s] to filing" are merely those conditions necessary to get a clerk to accept the petition, as opposed to conditions that require some *judicial* consideration. Respondent David DiGuglielmo (hereinafter respondent) characterizes petitioner's position, which the dissent also appears to embrace, see *post*, at 426, as a juridical game of "hot potato," in which a petition will be "properly filed" so long as a petitioner is able to hand it to the clerk without the clerk tossing it back. Brief for Respondent 16. Be that as it may, petitioner's theory is inconsistent with *Artuz*, where we explained that jurisdictional matters and fee payments, both of which often necessitate judicial scrutiny, are "condition[s] to filing."[4] See 531 U. S., at 9. We

[4] With regard to jurisdiction, see, *e. g.*, *Commonwealth* v. *Judge*, 568 Pa. 377, 387–389, 797 A. 2d 250, 257 (2002) (Pennsylvania court had jurisdiction over PCRA petition, despite the fact the petitioner was not in Pennsylvania custody). With regard to filing fees, see, *e. g.*, Pa. Rule Crim. Proc. 904(F) (2005) ("When a defendant satisfies the judge that the defendant is unable to pay the costs of the post-conviction collateral proceedings, the

fail to see how timeliness is any less a "filing" requirement than the mechanical rules that are enforceable by clerks, if such rules exist.[5] For example, Pennsylvania Rule of Criminal Procedure 901 (2005), which is entitled "Initiation of Post-Conviction Collateral Proceedings," lists two mandatory conditions: (A) the petition "shall" be filed within the time limit, and (B) the proceedings "shall be initiated by filing" a verified petition and "3 copies with the clerk of the court in which the defendant was convicted and sentenced." The natural reading is that (A) is every bit as much of a "condition to filing" as (B).

Petitioner also argues that, because § 2244(d)(2) refers to a "properly filed *application*," then any condition that must be applied on a claim-by-claim basis, such as Pennsylvania's time limit, cannot be a "condition to filing." (Emphasis added.) Section 2244, however, refutes this position. Section 2244(b)(3)(C), for example, states that the court of ap-

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judge shall order that the defendant be permitted to proceed *in forma pauperis*").

[5] Perhaps not unintentionally, petitioner fails to provide us any guidance on exactly which Pennsylvania Rules are subject to a clerk's striking for noncompliance. We doubt there are many such rules, both because few truly mechanical rules exist and because the role of the clerk in refusing petitions in most courts is quite limited. See, *e. g.*, Fed. Rule Civ. Proc. 5(e) ("The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices"); 28 U. S. C. § 2254 Rule 3(b) (2000 ed., Supp. IV) ("The clerk must file the petition and enter it on the docket"); see also Advisory Committee's Note on Habeas Corpus Rule 3(b), 28 U. S. C., p. 42 (2000 ed., Supp. IV) ("Rule 3(b) requires the clerk to file a petition, even though it may otherwise fail to comply with Rule 2. This rule . . . is not limited to those instances where the petition is defective only in form; the clerk would also be required, for example, to file the petition even though it lacked the requisite filing fee or an *in forma pauperis* form"). Indeed, not even filing in the right court would be a "condition to filing" under petitioner's limited theory. See 42 Pa. Cons. Stat. § 5103(a) (2004) (instructing that, when a petition is filed in the wrong court, it is not to be stricken but transferred to the proper court). Under this theory, "filing" conditions may be an empty set.

peals "may authorize the filing of a second or successive *application* only if it determines that the *application* makes a prima facie showing that the *application* satisfies the requirements of this subsection." (Emphases added.) Yet the "requirements" of the subsection are not applicable to the application as a whole; instead, they require inquiry into specific "claim[s]." See § 2244(b)(2)(A) ("claim" relies on a new rule made retroactive); § 2244(b)(2)(B) ("claim" with new factual predicate).[6] In fact, petitioner's argument is inconsistent with § 2244(d)(2) itself, which refers not just to a "properly filed application," but to a "properly filed application . . . *with respect to the pertinent judgment or claim.*" (Emphasis added.)

Finally, petitioner challenges the fairness of our interpretation. He claims that a "petitioner trying in good faith to exhaust state remedies may litigate in state court for years only to find out at the end that he was never 'properly filed,'" and thus that his federal habeas petition is time barred. Brief for Petitioner 30. A prisoner seeking state postconviction relief might avoid this predicament, however, by filing a "protective" petition in federal court and asking the federal court to stay and abey the federal habeas proceedings until state remedies are exhausted. See *Rhines* v. *Weber*, *ante*, at 278. A petitioner's reasonable confusion about whether a state filing would be timely will ordinarily constitute "good cause" for him to file in federal court. *Ibid.* ("[I]f the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in in-

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[6] Similarly, § 2244(d)(1) provides that a "1-year period of limitation shall apply to an *application* for a writ of habeas corpus." (Emphasis added.) The subsection then provides one means of calculating the limitation with regard to the "application" as a whole, § 2244(d)(1)(A) (date of final judgment), but three others that require claim-by-claim consideration, § 2244(d)(1)(B) (governmental interference); § 2244(d)(1)(C) (new right made retroactive); § 2244(d)(1)(D) (new factual predicate).

tentionally dilatory tactics," then the district court likely "should stay, rather than dismiss, the mixed petition").

The dissent suggests that our conclusion in *Artuz*, that state procedural bars "prescrib[ing] a rule of decision for a court" confronted with certain claims previously adjudicated or not properly presented are not "filing" conditions, requires the conclusion that the time limit at issue here also is not a "filing" condition. *Post*, at 425–426; see *Artuz* v. *Bennett*, 531 U. S., at 10–11 (discussing N. Y. Crim. Proc. Law §§ 440.10(2)(a) and (c) (McKinney 1994)). The dissent ignores the fact that *Artuz* itself distinguished between time limits and procedural bars. 531 U. S., at 8–10. For purposes of determining what are "filing" conditions, there is an obvious distinction between time limits, which go to the very initiation of a petition and a court's ability to consider that petition, and the type of "rule of decision" procedural bars at issue in *Artuz*, which go to the ability to obtain relief.[7] Far from requiring "verbal gymnastics," it must be the case that a petition that cannot even be initiated or considered due to the failure to include a timely claim is not "properly filed." *Id.*, at 10.

For these reasons, we hold that time limits, no matter their form, are "filing" conditions. Because the state court rejected petitioner's PCRA petition as untimely, it was not "properly filed," and he is not entitled to statutory tolling under § 2244(d)(2).

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[7] Compare, *e. g.*, Pa. Rule Crim. Proc. 901(A) (2005) (titled "Initiation of Post-Conviction Collateral Proceedings" and listing compliance with the time limit as one mandatory condition); 42 Pa. Cons. Stat. § 9545(b) (2002) (titled "Jurisdiction and proceedings" and listing the time limit); *Commonwealth* v. *Fahy*, 558 Pa. 313, 328, 737 A. 2d 214, 222 (1999) (describing the time limit as "jurisdictional"); 2 Ala. Rule Crim. Proc. 32.2(c) (2004–2005) (stating that a court "shall not entertain" a time-barred petition), with 42 Pa. Cons. Stat. § 9543(a) (2002) (titled "Eligibility for relief" and listing procedural bars, like those at issue in *Artuz*); 2 Ala. Rule Crim. Proc. 32.2(a) (2004–2005) (stating that a "petitioner will not be given relief" if certain procedural bars, like those at issue in *Artuz*, are present).

We now turn to petitioner's argument that he is entitled to *equitable* tolling for the time during which his untimely PCRA petition was pending in the state courts.[8] Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. See, *e. g.*, *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 96 (1990). Petitioner argues that he has satisfied the extraordinary circumstance test. He reasons that Third Circuit law at the time he sought relief required him to exhaust his state remedies and thus seek PCRA relief, even if it was unlikely the state court would reach the merits of his claims, and that state law made it appear as though he might gain relief, despite the petition's untimeliness. Thus, he claims, "state law and Third Circuit exhaustion law created a trap" on which he detrimentally relied as his federal time limit slipped away. Brief for Petitioner 34. Even if we were to accept petitioner's theory, he would not be entitled to relief because he has not established the requisite diligence.

Petitioner's PCRA petition set forth three claims: that his sentence was "illegal"; that his plea was invalid because he did not understand his life sentence was without the possibility of parole; and that he received ineffective assistance of counsel at "all levels of representation." App. 202, 220. The first two of these claims were available to petitioner as early as 1986. Indeed, petitioner asserted a version of his invalid plea claim in his August 21, 1986, PCHA petition. See *id.*, at 144. The third claim—ineffective assistance of

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[8] We have never squarely addressed the question whether equitable tolling is applicable to AEDPA's statute of limitations. Cf. *Pliler* v. *Ford*, 542 U. S. 225 (2004). Because respondent assumes that equitable tolling applies and because petitioner is not entitled to equitable tolling under any standard, we assume without deciding its application for purposes of this case.

counsel—related only to events occurring in or before 1991. See *id.*, at 191.

Yet petitioner waited years, without any valid justification, to assert these claims in his November 27, 1996, PCRA petition.[9] Had petitioner advanced his claims within a reasonable time of their availability, he would not now be facing any time problem, state or federal.[10] And not only did petitioner sit on his rights for years *before* he filed his PCRA petition, but he also sat on them for five more months *after* his PCRA proceedings became final before deciding to seek relief in federal court. See *id.*, at 372, 373. Under long-established principles, petitioner's lack of diligence precludes equity's operation. See *Irwin* v. *Department of Veterans Affairs*, *supra*, at 96; *McQuiddy* v. *Ware*, 20 Wall. 14, 19 (1874) ("Equity always refuses to interfere where there has been gross laches in the prosecution of rights").

Because petitioner filed his federal habeas petition beyond the deadline, and because he was not entitled to statutory or equitable tolling for any of that period, his federal petition is barred by the statute of limitations. The judgment of the Court of Appeals is affirmed.

*It is so ordered.*

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), prisoners in state custody have a 1-year

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[9] Petitioner's PCRA petition did cite allegedly "new" evidence to support his claims that he received ineffective assistance of counsel and that his plea was invalid because he did not understand his life sentence was without the possibility of parole. However, this new evidence was not new at all: It consisted of affidavits from petitioner's parents and brother regarding a meeting they attended with petitioner's counsel and petitioner in 1985 or 1986. App. 195–199.

[10] As noted previously, the PCRA time limit only came into effect in January 1996, see n. 1, *supra*, and petitioner's federal habeas petition was due in April 1997, see n. 2, *supra*.

window in which they may file a federal habeas corpus petition. 28 U. S. C. § 2244(d)(1). The statute provides, however, for tolling of the statute of limitations during the pendency of any "properly filed application for State postconviction or other collateral review." § 2244(d)(2). Under the interpretation of that statutory provision adopted by the Court today, a petition for state postconviction relief does not constitute a "properly filed application for . . . collateral review," even if the application has been accepted, filed, and reviewed in full by the state court. The Court's chosen rule means that a state application will not be deemed properly filed—no matter how long the state court has held the petition, how carefully it has reviewed the merits of the petition's claims, or how it has justified its decision—if the court ultimately determines that particular claims contained in the application fail to comply with the applicable state statute of limitations. The Court's interpretation of § 2244(d)(2) is not compelled by the text of that provision and will most assuredly frustrate its purpose.[1]

I

The words "properly filed application for . . . collateral review" are not defined in AEDPA. We did, however, interpret those words in *Artuz* v. *Bennett*, 531 U. S. 4 (2000), by considering their ordinary meaning in the context of the statutory scheme in which they appear. This Court has long understood that a "paper is filed when it is delivered to the proper official and by him received and filed." *United States* v. *Lombardo*, 241 U. S. 73, 76 (1916). In *Artuz*, we expanded upon that understanding, explaining that an "application is 'filed,' as that term is commonly understood, when it is delivered to, and accepted by, the appropriate court officer for placement into the official record. And an

[1] Because I would hold that Pace was entitled to statutory tolling, I need not answer the question whether the Court of Appeals erred by reversing the District Court's decision to grant Pace equitable tolling.

application is '*properly* filed' when its delivery and acceptance are in compliance with the applicable laws and rules governing filings." 531 U. S., at 8 (citations omitted). Because applications and claims are distinct, we held that a petitioner's *application* for postconviction review is "properly filed" even when his legal *claims* are procedurally barred under state law.

*Artuz* left open the question presented here—whether a state statute of limitations that allows certain categories of petitioners to file otherwise late applications is comparable to a general precondition to filing (such as the payment of a filing fee) or is instead more akin to a procedural bar that prevents a court from considering particular claims. *Id.*, at 8–9, n. 2. If the state time bar at issue here is more like the former, Pace's failure to comply with it would make his application improperly filed under AEDPA. If, however, the state time bar is more like the procedural bar in *Artuz*, Pace's failure to comply with it would not change the fact that his application was "properly filed." Before answering that question, it is useful to explain why the state court ultimately found Pace's application to be untimely.

## II

Pace filed the application in question—his second request for state postconviction review—*pro se* on November 27, 1996, under the Pennsylvania Post Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. §9541 *et seq.* (1998).[2] Pace's

[2] Pace's conviction became final in 1986, long before the Pennsylvania Legislature adopted the PCRA's current statute of limitations. Pace's original petition for postconviction relief was filed under the Pennsylvania Post Conviction Hearing Act, 42 Pa. Cons. Stat. §9541 *et seq.* (1988) (amended and renamed by Act No. 1988–47, §§3, 6, 1988 Pa. Laws pp. 337–342), which did not include a statute of limitations. The Pennsylvania Supreme Court denied Pace's request for review on September 3, 1992. The PCRA time bar did not become effective until January 16, 1996. See Act No. 1995–32, §9579, 1995 Pa. Laws pp. 1125–1126 (Spec. Sess. 1).

PCRA petition raised two claims that he alleged had not been presented during his first round of postconviction review: first, that his life-without-parole sentence was unconstitutional under state and federal law; and second, that his guilty plea colloquy violated due process. Pace provided new evidence that he had not presented during his first round of postconviction review, see App. 191, 195–201, and explained to the court that his two new claims should not be procedurally barred because they had not been "fully litigated or waived" under state law, *id.*, at 191. Pace's justifications for raising these two new claims make plain that he was attempting to fit his application within the commonly recognized judicial exceptions to Pennsylvania's then-applicable state procedural bars.[3]

At the time Pace filed his PCRA petition, no Pennsylvania court had yet applied the PCRA statute of limitations to a petitioner whose conviction had become final prior to the effective date of the Act.[4] Nor had the time in which Pace had a right to file a federal habeas petition expired. Under

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[3] For instance, Pace argued that his failure to raise the claims below should be excused because of ineffective assistance of counsel. See App. 191–194, 220–226. Pace also argued that a failure to consider the new claim would constitute a "miscarriage of justice," *id.*, at 192, 217–219, and that his new claims challenged the legality of his sentence, *id.*, at 189, 192. To support each of these arguments, Pace cited state cases demonstrating the existence of judicial exceptions to procedural default.

[4] That time bar provides that "[a]ny petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that: (i) the failure to *raise the claim* previously was the result of interference by government officials with the presentation of the claim . . . ; (ii) the facts upon which *the claim* is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively." 42 Pa. Cons. Stat. § 9545(b) (1998) (emphasis added).

AEDPA, Pace had until April 24, 1997, to file a federal habeas petition. See *Carey* v. *Saffold*, 536 U. S. 214, 217 (2002) (1-year limitations period runs from April 24, 1996, for any prisoner whose conviction became final prior to the effective date of the Act). Pace could not, however, obtain relief in a federal court without first exhausting his state remedies. 28 U. S. C. § 2254(b)(1)(A). Thus, as far as Pace knew on November 27, 1996, there was no state or federal statute of limitations that precluded him from obtaining relief, but he was required (1) by AEDPA to go to state court and (2) by state law to demonstrate that his claim was not procedurally barred. Unless Pace's PCRA petition tolled the federal statute of limitations, his claims would be time barred in federal court on April 24, 1997.

Pace's petition was docketed and the court appointed counsel. On July 23, 1997, the state trial court denied relief on the merits. Pace appealed. In May 1998, well after Pace's time to file a federal habeas petition had expired, the Commonwealth filed a brief in the state appellate court, which argued *for the first time* that Pace's petition was untimely under the PCRA's statute of limitations. On December 3, 1998, the state appellate court agreed, explaining that none of Pace's several claims fell within the three statutory exceptions to untimeliness contained in 42 Pa. Cons. Stat. § 9545(b) (1998). The state appellate court's conclusion became final on July 29, 1999. It is that determination that provides the basis for this Court's ruling that, as a matter of federal law, the pleading that generated protracted litigation in the state courts was never "properly filed" in the first place.

## III

In *Artuz* v. *Bennett*, 531 U. S. 4 (2000), we held that an application for state postconviction review may be considered "properly filed" within the meaning of 28 U. S. C. § 2244(d)(2) even if the application fails to comply with state-law procedural requirements that preclude relief on the mer-

its of the applicant's claims. 531 U. S., at 8. To construe "'properly filed application' to mean 'application raising claims that are not mandatorily procedurally barred,' [would elide] the difference between an 'application' and a 'claim.' Only individual *claims*, and not the application containing those claims, can be procedurally defaulted under state law . . . ." *Id.*, at 9. Furthermore:

> "Ignoring this distinction would require judges to engage in verbal gymnastics when an application contains some claims that are procedurally barred and some that are not. Presumably a court would have to say that the application is 'properly filed' *as to* the nonbarred claims, and not 'properly filed' *as to* the rest. The statute, however, . . . does not contain the peculiar suggestion that a single application can be both 'properly filed' and not 'properly filed.' Ordinary English would refer to certain *claims* as having been properly *presented* or *raised*, irrespective of whether the application containing those claims was properly filed." *Id.*, at 10.

The same reasoning applies with equal force to the PCRA time bar, which in effect operates in the same manner as the procedural bar in *Artuz*. Under the PCRA, the state court must determine not whether the entire application is time barred, but rather whether individual *claims* are time barred given the various exceptions enumerated in § 9545(b). See n. 3, *supra*. Imagine, for example, a Pennsylvania petitioner who states two claims in what is his second state habeas petition. The first claim asserts a violation of due process rights under *Brady* v. *Maryland*, 373 U. S. 83 (1963), in which the petitioner demonstrates that his failure to raise the claim during his first round of state postconviction review was "the result of interference by government officials with the presentation of the claim" under 42 Pa. Cons. Stat. § 9545(b)(1)(i) (1998). The second claim asserts an ineffective-assistance-of-counsel claim based on the same evi-

dence raised in the petitioner's first PCRA application. Under the rule announced by the Court today, a federal court would be forced to conclude that the petitioner's first claim was a "properly filed application for . . . collateral review" for AEDPA purposes, while his second claim was improperly filed. This is precisely the type of incoherent result that *Artuz* sought to avoid.

Incoherent results will not be limited to petitions filed in Pennsylvania. Many States provide exceptions from their postconviction statutes of limitations that apply to applicants' individual claims. See, *e. g.*, Alaska Stat. § 12.72.020 (Lexis 2004) (exempting from the statute of limitations, *inter alia*, any *claims* "based on newly discovered evidence"); Fla. Rule Crim. Proc. 3.850 (2005 Supp. Pamphlet) (excepting from the general time bar any claim based on newly discovered evidence, newly recognized rights, or neglect of counsel); Ill. Comp. Stat. Ann., ch. 725, § 5/122–1(c) (West Supp. 2004) (allowing for late filings when petitioner can show that delay was not due to negligence and excepting entirely from the limitations period any "claim of actual innocence"); Iowa Code § 822.3 (2003) (exception for any "ground of fact or law that could not have been raised within the applicable time period"); Okla. Stat. Ann., Tit. 22, §§ 1089(D)(4)–(8) (West Supp. 2005) (requiring the reviewing court to examine each claim and permitting late filing if any included claim could not have previously been presented on account of legal or factual unavailability). For all applications originating in such States, federal district courts must now engage in the very "verbal gymnastics" that *Artuz* condemned. See 531 U. S., at 10.

The Court's interpretation of "properly filed" in this context conflicts with the meaning we gave the phrase in *Artuz*. Indeed, the Court's rule suggests that the phrase "properly filed" takes on a different meaning when applied to time bars than it does in the context of procedural bars. This Court

has generally declined to adopt rules that would give the same statutory provision different meanings in different contexts, see, *e. g.*, *Clark* v. *Martinez*, 543 U. S. 371, 386 (2005), and I would decline to do so here.

It would be much wiser simply to apply *Artuz*'s rule to state time bars that, like the PCRA, operate like a procedural bar. In this case, the PCRA time bar's enumerated exceptions, which require state courts to review the claims elucidated in postconviction petitions and to determine whether particular claims trigger the applicability of the exceptions, plainly function like a procedural bar. Thus, I would hold that Pace's petition was "properly filed"—it was "delivered to, and accepted by, the appropriate court officer for placement into the official record" and complied with the "applicable laws and rules governing filings." *Artuz*, 531 U. S., at 8.

Application of the *Artuz* rule in this context is clearly consonant with the statutory text.[5] A time bar is nothing more than a species of the larger category of procedural bars that may preclude consideration of the merits of the state petition, and may raise questions that are equally difficult to decide. Indeed, under Federal Rule of Civil Procedure 8, the contention that a claim is untimely is an affirmative defense that can be waived. Because most state laws respecting untimely filings of postconviction petitions function in a manner identical to the procedural bar at issue in *Artuz*, there is no justification for giving special treatment to any state rule based on untimeliness.

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[5] The majority claims that this interpretation of "properly filed" is inconsistent with the text of § 2244(d)(2). See *ante*, at 416. But the rule I favor relies on the same interpretation, of the same statutory text, that we adopted in *Artuz*. See 531 U. S., at 10. Unless the Court means implicitly to overrule *Artuz*, its rule compels the conclusion that the singular phrase "properly filed" takes on different meanings in different contexts. That is the same interpretive exercise we unequivocally rejected in *Clark* v. *Martinez*, 543 U. S. 371, 386 (2005).

## IV

A rule treating statutes of limitations equivalently to procedural bars would accomplish the statutory purposes Congress sought to vindicate in AEDPA. Congress fashioned 28 U. S. C. § 2244(d)(2) in order to provide a strong "incentive for individuals to seek relief from the state courts before filing federal habeas petitions." *Duncan* v. *Walker*, 533 U. S. 167, 180 (2001). As we explained in *Duncan:*

> "The tolling provision of § 2244(d)(2) balances the interests served by the exhaustion requirement and the limitation period. Section 2244(d)(2) promotes the exhaustion of state remedies by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued. At the same time, the provision limits the harm to the interest in finality by according tolling effect only to 'properly filed application[s] . . . .'" *Id.*, at 179–180.

In construing the words "properly filed," therefore, we must consider not only the "potential for delay in the adjudication of federal law claims," but also the need to avoid overburdening district courts by encouraging "the very piecemeal litigation that the exhaustion requirement is designed to reduce." *Id.*, at 180. AEDPA, after all, was designed to "streamline and simplify" the federal habeas system in order to reduce the "interminable delays" and "shameful overloading" that had resulted from "various aspects of this Court's habeas corpus jurisprudence." *Hohn* v. *United States*, 524 U. S. 236, 264–265 (1998) (SCALIA, J., dissenting). The Court's rule is unfaithful to these legislative goals.

The Court's principal justification for its rule is the fear that allowing statutory tolling in this context would allow prisoners to extend the federal statute of limitations indefinitely by repeatedly filing meritless state petitions. See *ante*, at 413 ("[A] state prisoner could toll the statute of limitations at will simply by filing untimely state postconviction

petitions"). That fear is misguided for two reasons. First, it ignores a basic fact that we have recognized repeatedly—a "prisoner's principal interest, of course, is in obtaining speedy federal relief on his claims." *Rose* v. *Lundy*, 455 U. S. 509, 520 (1982) (plurality opinion). Indeed, it is an understatement to say that the vast majority of federal prisoners "have no incentive to delay adjudication of their claims," *Duncan*, 533 U. S., at 191 (BREYER, J., dissenting). Most prisoners have precisely the opposite incentive because delaying the initiation of federal postconviction relief will almost assuredly maximize their periods of incarceration.

Second, the Court's concern is premised on the incorrect assumption that the phrase "properly filed" has no meaningful content unless all untimely petitions are by definition improper. The reason that assumption is wrong is because any claim that a state application has tolled the limitations period will always depend on the district court's finding that the petition was "properly filed." In my view, it would be entirely appropriate, and consistent with the text and purposes of AEDPA, to define "properly filed" as excluding any filings deemed by the district court to be repetitious or abusive. If an application for postconviction review is not filed in good faith—filed, in other words, explicitly to prolong the federal statute of limitations—it would be improper under AEDPA, and statutory tolling would not be appropriate. Federal and state courts have considerable experience identifying and preventing the kind of dilatory pleadings that concern the Court today. See, *e. g.*, *McCleskey* v. *Zant*, 499 U. S. 467, 479–489 (1991). There is no reason that courts could not engage in similar analyses to prevent state prisoners from prolonging indefinitely the AEDPA statute of limitations.[6]

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[6] Such an inquiry is consistent with *Artuz*, which distinguished between properly filed applications and individual claims contained within those applications. An application filed intentionally to prolong the federal statute of limitations would be improper in its entirety. Indeed, it is difficult to imagine how one particular claim in an application could be im-

Unfortunately, the most likely consequence of the Court's new rule will be to increase, not reduce, delays in the federal system. The inevitable result of today's decision will be a flood of protective filings in the federal district courts. As the history of this case demonstrates, litigants, especially those proceeding *pro se*, cannot predict accurately whether a state court will find their application timely filed. Because a state court's timeliness ruling cannot be predicted with certainty, prisoners who would otherwise run the risk of having the federal statute of limitations expire while they are exhausting their state remedies will have no choice but to file premature federal petitions accompanied by a request to stay federal proceedings pending the exhaustion of their state remedies. Cf. *Rhines* v. *Weber*, *ante*, at 278. The Court admits that this type of protective filing will result from its holding. See *ante*, at 416. I fail to see any merit in a rule that knowingly and unnecessarily "add[s] to the burdens on the district courts in a way that simple tolling . . . would not." *Duncan*, 533 U. S., at 192 (BREYER, J., dissenting).

Beyond increasing the burdens faced by district courts, the Court's tacit encouragement of countless new protective filings will diminish the "statutory incentives to proceed first in state court" and thereby "increase the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce." *Id.*, at 180. Congress enacted § 2244(d)(2), along with § 2254(b), to "encourage litigants *first* to exhaust all state remedies and *then* to file their federal habeas petitions as soon as possible." *Id.*, at 181. The Court's rule turns that statutory goal on its head—in essence, encouraging all petitioners who have doubts regarding the timeliness of their state petitions to file simultaneously for relief in federal and state court. *Artuz* appropriately prevented such a result with respect to proce-

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properly motivated to delay federal proceedings, while another claim was "properly filed" under AEDPA.

dural bars. Because I see no reason to depart from that sound approach, I would hold that Pace's application was "properly filed" under AEDPA. I respectfully dissent.

Syllabus

# BATES ET AL. *v.* DOW AGROSCIENCES LLC

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 03–388. Argued January 10, 2005—Decided April 27, 2005

Petitioner Texas peanut farmers allege that their crops were severely damaged by the application of respondent's (Dow) "Strongarm" pesticide, which the Environmental Protection Agency (EPA) registered pursuant to its authority under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Petitioners gave Dow notice of their intent to sue, claiming that Strongarm's label recommended its use in all peanut-growing areas when Dow knew or should have known that it would stunt the growth of peanuts in their soil, which had pH levels of at least 7.0. In response, Dow sought a declaratory judgment in the Federal District Court, asserting that FIFRA pre-empted petitioners' claims. Petitioners counterclaimed, raising several state-law claims sounding in strict liability, negligence, fraud, and breach of express warranty. The District Court rejected one claim on state-law grounds and found the others barred by FIFRA's pre-emption provision, 7 U. S. C. § 136v(b). Affirming, the Fifth Circuit held that § 136v(b) expressly pre-empted the state-law claims because a judgment against Dow would induce it to alter its product label.

*Held:*

1. Under FIFRA, which was comprehensively amended in 1972, a manufacturer must obtain permission to market a pesticide by submitting a proposed label and supporting data to EPA, which will register the pesticide if it is efficacious, it will not cause unreasonable adverse effects on humans and the environment, and its label complies with the statute's misbranding prohibition. A pesticide is "misbranded" if its label, for example, contains a statement that is "false or misleading," § 136(q)(1)(A), or lacks adequate instructions or warnings, §§ 136(q)(1)(F), (G). A State may regulate the sale and use of federally registered pesticides to the extent that regulation does not permit any sales or uses prohibited by FIFRA, § 136v(a), but "[s]uch State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA]," § 136v(b). Though tort litigation against pesticide manufacturers was a common feature of the legal landscape in 1972, after this Court held in *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, that the term "requirement" in the Public Health Cigarette Smoking Act of 1969 included

common-law duties, and therefore pre-empted certain tort claims against cigarette companies, courts began holding that § 136v(b) pre-empted claims such as petitioners'. Pp. 437–442.

2. FIFRA's pre-emption provision applies only to state-law "requirements for labeling or packaging." § 136v(b). While the Fifth Circuit was correct that "requirements" embraces both positive enactments and common-law duties, it erred in supposing that petitioners' defective design, defective manufacture, negligent testing, and breach-of-express warranty claims were premised on requirements for *labeling or packaging*. None of the common-law rules upon which these claims are based requires that manufacturers label or package their products in any particular way. The Fifth Circuit reached a contrary conclusion by reasoning that a finding of liability on these claims would induce Dow to alter its label. This was error because the prohibitions of § 136v(b) apply only to "requirements." A requirement is a rule of law that must be obeyed; an event, such as a jury verdict, that merely motives an optional decision is not a requirement. The proper inquiry calls for an examination of the elements of the common-law duty at issue, not for speculation as to whether a jury verdict will prompt the manufacturer to change its label. Pp. 442–446.

3. Petitioners' fraud and negligent-failure-to-warn claims, by contrast, are based on common-law rules that qualify as "requirements for labeling or packaging," since these rules set a standard for a product's labeling that Dow is alleged to have violated. While these common-law rules are subject to § 136v(b), it does not automatically follow that they are pre-empted. Unlike the pre-emption clause in *Cipollone*, § 136v(b) prohibits only state-law labeling requirements that are "in addition to or different from" FIFRA's labeling requirements. Thus, § 136v(b) pre-empts any statutory or common-law rule that would impose a labeling requirement that diverges from those set out in FIFRA and its implementing regulations. It does not pre-empt a state-law requirement that is equivalent to, and fully consistent with, FIFRA's labeling standards. This "parallel requirements" reading of § 136v(b) finds strong support in *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470. Thus, although FIFRA does not provide a federal remedy to those injured as a result of a manufacturer's violation of FIFRA's labeling requirements, nothing in § 136v(b) precludes States from providing such a remedy. Dow's contrary reading of § 136v(b) fails to make sense of the phrase "in addition to or different from." Even if Dow offered a plausible alternative reading of § 136v(b), this Court would have a duty to accept the reading disfavoring pre-emption. See *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645, 655. The long history of tort litigation against manufacturers of poisonous substances adds force to the presumption against pre-emption, for Con-

gress surely would have expressed its intention more clearly if it had meant to deprive injured parties of a long available form of compensation. Moreover, this history emphasizes the importance of providing an incentive to manufacturers to use the utmost care in distributing inherently dangerous items. Finally, the policy objections raised against this Court's reading of § 136v(b) are unpersuasive. Pp. 446–452.

4. Under the "parallel requirements" reading of § 136v(b), a state-law labeling requirement must be equivalent to its federal counterpart to avoid pre-emption. State law need not, however, explicitly incorporate FIFRA's standards as an element of a cause of action. Because this Court has not received sufficient briefing on whether the Texas law governing petitioners' fraud and failure-to-warn claims is equivalent to FIFRA's misbranding standards and any relevant regulations, it is up to the Fifth Circuit to resolve the issue in the first instance. Pp. 453–454.

332 F. 3d 323, vacated and remanded.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, *post*, p. 454. THOMAS, J., filed an opinion concurring in the judgment in part and dissenting in part, in which SCALIA, J., joined, *post*, p. 455.

*David C. Frederick* argued the cause for petitioners. With him on the briefs were *Scott K. Attaway* and *Kimberly S. Keller.*

*Seth P. Waxman* argued the cause for respondent. With him on the brief were *David W. Ogden, Paul R. Q. Wolfson, Dean T. Barnhard,* and *Joseph R. Alberts.*

*Lisa S. Blatt* argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Acting Solicitor General Clement, Assistant Attorney General Sansonetti, Deputy Solicitor General Hungar, Deputy Assistant Attorney General Clark, Jeffrey P. Minear, James C. Kilbourne,* and *Kenneth Von Schaumburg.**

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*Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *Greg Abbott*, Attorney General of Texas, *R. Ted Cruz*, Solicitor General, *Barry R. McBee*, First Assistant Attorney General, *Edward D. Burbach*, Deputy Attorney General, and *Sean D. Jordan*, Assistant Solicitor General, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Bill Lockyer* of California, *Richard Blu-*

JUSTICE STEVENS delivered the opinion of the Court.

Petitioners are 29 Texas peanut farmers who allege that in the 2000 growing season their crops were severely damaged by the application of respondent's newly marketed pesticide named "Strongarm." The question presented is whether the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U. S. C. § 136 *et seq.* (2000 ed. and Supp. II), pre-empts their state-law claims for damages.

I

Pursuant to its authority under FIFRA, the Environmental Protection Agency (EPA) conditionally registered Strongarm on March 8, 2000, thereby granting respondent (Dow) permission to sell this pesticide—a weed killer[1]—in

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*menthal* of Connecticut, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Thomas F. Reilly* of Massachusetts, *Mike Hatch* of Minnesota, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Eliot Spitzer* of New York, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Jerry W. Kilgore* of Virginia, and *Christine O. Gregoire* of Washington; for the Association of Trial Lawyers of America by *R. C. Westmoreland* and *Todd A. Smith;* for the Natural Resources Defense Council et al. by *Patti Goldman, Grant Cope, Brian Wolfman,* and *Leslie Brueckner;* for the Western Peanut Growers Association et al. by *Sean H. Donahue* and *David T. Goldberg;* and for Herbert Samuel Harrison by *Mikal C. Watts.*

Briefs of *amici curiae* urging affirmance were filed for the American Chemistry Council by *Richard O. Faulk;* for BASF Corp. by *Bruce Jones;* for the Chamber of Commerce of the United States by *Alan Untereiner* and *Robin S. Conrad;* for Croplife America et al. by *Lawrence S. Ebner* and *Douglas T. Nelson;* for E. I. Du Pont de Nemours and Co. et al. by *Viet D. Dinh;* for the Product Liability Advisory Council, Inc., by *Kenneth S. Geller* and *Miriam R. Nemetz;* for the Texas Chemical Council by *William Powers, Jr., David M. Gunn,* and *Russell S. Post;* for the Washington Legal Foundation by *Daniel J. Popeo;* and for Edwin L. Johnson by *David E. Menotti.*

*James L. Moore, Glen Shu, Matthew W. Caligur,* and *Patrick Lysaught* filed a brief for the Defense Research Institute as *amicus curiae.*

[1] Strongarm would more commonly be called a herbicide, but it is classified as a pesticide for purposes of FIFRA. See 7 U. S. C. §§ 136(t), (u).

the United States. Dow obtained this registration in time to market Strongarm to Texas farmers, who normally plant their peanut crops around May 1. According to petitioners—whose version of the facts we assume to be true at this stage—Dow knew, or should have known, that Strongarm would stunt the growth of peanuts in soils with pH levels of 7.0 or greater.[2] Nevertheless, Strongarm's label stated, "Use of Strongarm is recommended in all areas where peanuts are grown," App. 108, and Dow's agents made equivalent representations in their sales pitches to petitioners. When petitioners applied Strongarm on their farms—whose soils have pH levels of 7.2 or higher, as is typical in western Texas—the pesticide severely damaged their peanut crops while failing to control the growth of weeds. The farmers reported these problems to Dow, which sent its experts to inspect the crops.

Meanwhile, Dow reregistered its Strongarm label with EPA prior to the 2001 growing season. EPA approved a "supplemental" label that was for "[d]istribution and [u]se [o]nly in the states of New Mexico, Oklahoma and Texas," *id.*, at 179, the three States in which peanut farmers experienced crop damage. This new label contained the following warning: "Do not apply Strongarm to soils with a pH of 7.2 or greater." *Id.*, at 181.

After unsuccessful negotiations with Dow, petitioners gave Dow notice of their intent to bring suit as required by the Texas Deceptive Trade Practices-Consumer Protection Act[3] (hereinafter Texas DTPA). In response, Dow filed a declaratory judgment action in Federal District Court, asserting that petitioners' claims were expressly or impliedly pre-empted by FIFRA. Petitioners, in turn, brought counterclaims, including tort claims sounding in strict liability and negligence. They also alleged fraud, breach of war-

[2] The term "pH," which stands for pondus hydrogenii, or "potential hydrogen," refers to the acidity of the soil.

[3] Tex. Bus. & Com. Code Ann. § 17.01 *et seq.* (West 2002).

ranty, and violation of the Texas DTPA. The District Court granted Dow's motion for summary judgment, rejecting one claim on state-law grounds and dismissing the remainder as expressly pre-empted by 7 U. S. C. § 136v(b), which provides that States "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter."

The Court of Appeals affirmed. It read § 136v(b) to pre-empt any state-law claim in which "a judgment against Dow would induce it to alter its product label." 332 F. 3d 323, 331 (CA5 2003). The court held that because petitioners' fraud, warranty, and deceptive trade practices claims focused on oral statements by Dow's agents that did not differ from statements made on the product's label, success on those claims would give Dow a "strong incentive" to change its label. Those claims were thus pre-empted. *Id.*, at 331–332. The court also found that petitioners' strict liability claim alleging defective design was essentially a "disguised" failure-to-warn claim and therefore pre-empted. *Id.*, at 332. It reasoned: "One cannot escape the heart of the farmers' grievance: Strongarm is dangerous to peanut crops in soil with a pH level over 7.0, and that was not disclosed to them. . . . It is inescapable that success on this claim would again necessarily induce Dow to alter the Strongarm label." *Id.*, at 332–333. The court employed similar reasoning to find the negligent testing and negligent manufacture claims pre-empted as well. *Id.*, at 333.

This decision was consistent with those of a majority of the Courts of Appeals,[4] as well of several state high courts,[5] but conflicted with the decisions of other courts[6] and with

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[4] See, *e. g.*, *Grenier* v. *Vermont Log Buildings, Inc.*, 96 F. 3d 559 (CA1 1996); *Kuiper* v. *American Cyanamid Co.*, 131 F. 3d 656 (CA7 1997); *Netland* v. *Hess & Clark, Inc.*, 284 F. 3d 895 (CA8 2002).

[5] See, *e. g.*, *Etcheverry* v. *Tri-Ag Serv., Inc.*, 22 Cal. 4th 316, 993 P. 2d 366 (2000).

[6] See, *e. g.*, *Ferebee* v. *Chevron Chemical Co.*, 736 F. 2d 1529 (CADC 1984); *American Cyanamid Co.* v. *Geye*, 79 S. W. 3d 21 (Tex. 2002).

the views of EPA set forth in an *amicus curiae* brief filed with the California Supreme Court in 2000.[7] We granted certiorari to resolve this conflict. 542 U. S. 936 (2004).

## II

Prior to 1910 the States provided the primary and possibly the exclusive source of regulatory control over the distribution of poisonous substances. Both the Federal Government's first effort at regulation in this area, the Insecticide Act of 1910, 36 Stat. 331, and FIFRA as originally enacted in 1947, ch. 125, 61 Stat. 163, primarily dealt with licensing and labeling. Under the original version of FIFRA, all pesticides sold in interstate commerce had to be registered with the Secretary of Agriculture. The Secretary would register a pesticide if it complied with the statute's labeling standards and was determined to be efficacious and safe.[8] In 1970, EPA assumed responsibility for this registration process.

In 1972, spurred by growing environmental and safety concerns, Congress adopted the extensive amendments[9] that "transformed FIFRA from a labeling law into a comprehensive regulatory statute." *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 991 (1984). "As amended, FIFRA regulated the use, as well as the sale and labeling, of pesticides; regulated pesticides produced and sold in both intrastate and interstate commerce; provided for review, cancellation, and suspension of registration; and gave EPA greater enforcement authority." *Id.*, at 991–992. The 1972 amendments also imposed

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[7] See Brief for United States as *Amicus Curiae* in *Etcheverry* v. *Tri-Ag Serv., Inc.*, No. S072524 (Cal. Sup. Ct.) (hereinafter Brief *Amicus Curiae* for United States in *Etcheverry*). The Acting Solicitor General has since adopted a contrary position. See Brief for United States as *Amicus Curiae* 20.

[8] If the Secretary declined registration, and the manufacturer refused to make changes, the Secretary was required to register the pesticide "under protest." In 1964, however, Congress eliminated this procedure, and required disappointed manufacturers to challenge a denial of registration through administrative review. 78 Stat. 190.

[9] Federal Environmental Pesticide Control Act of 1972, 86 Stat. 973.

a new criterion for registration—environmental safety. *Id.*, at 992. See generally 4 F. Grad, Treatise on Environmental Law §§ 8.02–8.03 (2004) (tracing FIFRA's statutory evolution).

Under FIFRA as it currently stands, a manufacturer seeking to register a pesticide must submit a proposed label to EPA as well as certain supporting data. 7 U. S. C. §§ 136a(c)(1)(C), (F). The agency will register the pesticide if it determines that the pesticide is efficacious (with the caveat discussed below), § 136a(c)(5)(A); that it will not cause unreasonable adverse effects on humans and the environment, §§ 136a(c)(5)(C), (D); § 136(bb); and that its label complies with the statute's prohibition on misbranding, § 136a(c)(5)(B); 40 CFR § 152.112(f) (2004). A pesticide is "misbranded" if its label contains a statement that is "false or misleading in any particular," including a false or misleading statement concerning the efficacy of the pesticide. 7 U. S. C. § 136(q)(1)(A); 40 CFR § 156.10(a)(5)(ii). A pesticide is also misbranded if its label does not contain adequate instructions for use, or if its label omits necessary warnings or cautionary statements. 7 U. S. C. §§ 136(q)(1)(F), (G).[10]

Because it is unlawful under the statute to sell a pesticide that is registered but nevertheless misbranded, manufacturers have a continuing obligation to adhere to FIFRA's labeling requirements. § 136j(a)(1)(E); see also § 136a(f)(2) (registration is prima facie evidence that the pesticide and its labeling comply with the statute's requirements, but registration does not provide a defense to the violation of the statute); § 136a(f)(1) (a manufacturer may seek approval to

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[10] A pesticide label must also conspicuously display any statement or information specifically required by the statute or its implementing regulations. 7 U. S. C. § 136(q)(1)(E). To mention only a few examples, the label must contain the name and address of the producer, the product registration number, and an ingredient statement. 40 CFR §§ 156.10(a)(1)(ii), (iv), (vi) (2004).

amend its label). Additionally, manufacturers have a duty to report incidents involving a pesticide's toxic effects that may not be adequately reflected in its label's warnings, 40 CFR §§ 159.184(a), (b) (2004), and EPA may institute cancellation proceedings, 7 U. S. C. § 136d(b), and take other enforcement action if it determines that a registered pesticide is misbranded.[11]

Section 136v, which was added in the 1972 amendments, addresses the States' continuing role in pesticide regulation. As currently codified, § 136v provides:

> "(a) In general
>
> "A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> "(b) Uniformity
>
> "Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.
>
> "(c) Additional uses
>
> "(1) A State may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that State to meet special local needs in accord with the purposes of this subchapter and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator. Such registration shall be deemed registration under section 136a of this title for all purposes of this subchapter, but shall authorize distribution and use only within such State. . . ."

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[11] EPA may issue "stop sale, use, or removal" orders and may seize offending products. 7 U. S. C. §§ 136k(a), (b). Further, manufacturers may be subjected to civil and criminal penalties for violating FIFRA's requirements. § 136*l*.

In 1978, Congress once again amended FIFRA, 92 Stat. 819, this time in response to EPA's concern that its evaluation of pesticide efficacy during the registration process diverted too many resources from its task of assessing the environmental and health dangers posed by pesticides. Congress addressed this problem by authorizing EPA to waive data requirements pertaining to efficacy, thus permitting the agency to register a pesticide without confirming the efficacy claims made on its label. § 136a(c)(5). In 1979, EPA invoked this grant of permission and issued a general waiver of efficacy review, with only limited qualifications not applicable here. See 44 Fed. Reg. 27932 (1979); 40 CFR § 158.640(b) (2004). In a notice published years later in 1996, EPA confirmed that it had "stopped evaluating pesticide efficacy for routine label approvals almost two decades ago," Pesticide Registration Notice 96–4, p. 3 (June 3, 1996), available at http://www.epa.gov/opppmsd1/PR_Notices/pr96-4.html, App. 232, and clarified that "EPA's approval of a pesticide label does not reflect any determination on the part of EPA that the pesticide will be efficacious or will not damage crops or cause other property damage," *id.*, at 5, App. 235. The notice also referred to an earlier statement in which EPA observed that "'pesticide producers are aware that they are potentially subject to damage suits by the user community if their products prove ineffective in actual use.'" *Id.*, at 2, App. 230 (quoting 47 Fed. Reg. 40661 (col. 2) (1982)). This general waiver was in place at the time of Strongarm's registration; thus, EPA never passed on the accuracy of the statement in Strongarm's original label recommending the product's use "in all areas where peanuts are grown."

Although the modern version of FIFRA was enacted over three decades ago, this Court has never addressed whether that statute pre-empts tort and other common-law claims arising under state law. Courts entertained tort litigation against pesticide manufacturers since well before the pas-

sage of FIFRA in 1947,[12] and such litigation was a common feature of the legal landscape at the time of the 1972 amendments.[13] Indeed, for at least a decade after those amendments, arguments that such tort suits were pre-empted by § 136v(b) either were not advanced or were unsuccessful. See, *e. g.*, *Ferebee* v. *Chevron Chemical Co.*, 736 F. 2d 1529 (CADC 1984). It was only after 1992 when we held in *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, that the term "requirement or prohibition" in the Public Health Cigarette Smoking Act of 1969 included common-law duties, and therefore pre-empted certain tort claims against cigarette companies, that a groundswell of federal and state decisions emerged holding that § 136v(b) pre-empted claims like those advanced in this litigation.

This Court has addressed FIFRA pre-emption in a different context. In *Wisconsin Public Intervenor* v. *Mortier*, 501 U. S. 597 (1991), we considered a claim that § 136v(b) pre-empted a small town's ordinance requiring a special permit for the aerial application of pesticides. Although the ordinance imposed restrictions not required by FIFRA or any EPA regulation, we unanimously rejected the pre-emption claim. In our opinion we noted that FIFRA was not "a sufficiently comprehensive statute to justify an inference that Congress had occupied the field to the exclusion of the

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[12] See, *e. g.*, *Mossrud* v. *Lee*, 163 Wis. 229, 157 N. W. 758 (1916); *West Disinfecting Co.* v. *Plummer*, 44 App. D. C. 345 (1916); *McCrossin* v. *Noyes Bros. & Cutler, Inc.*, 143 Minn. 181, 173 N. W. 566 (1919); *White* v. *National Bank of Commerce*, 99 Cal. App. 519, 278 P. 915 (1929).

[13] See Hursh, Annotation, Liability of Manufacturer or Seller for Injury Caused by Animal Feed or Medicines, Crop Sprays, Fertilizers, Insecticides, Rodenticides, and Similar Products, 81 A. L. R. 2d 138, 144 (1962) ("A duty of due, reasonable care binds manufacturers and sellers of products of this kind. This duty of care includes a duty to warn of product-connected dangers, a duty on the part of the manufacturer to subject the product to reasonable tests, and a duty on the part of the seller to subject the product to reasonable inspection" (footnotes omitted)) (collecting cases).

States." *Id.*, at 607. "To the contrary, the statute leaves ample room for States and localities to supplement federal efforts even absent the express regulatory authorization of § 136v(a)." *Id.*, at 613.

As a part of their supplementary role, States have ample authority to review pesticide labels to ensure that they comply with both federal and state labeling requirements.[14] Nothing in the text of FIFRA would prevent a State from making the violation of a federal labeling or packaging requirement a state offense, thereby imposing its own sanctions on pesticide manufacturers who violate federal law. The imposition of state sanctions for violating state rules that merely duplicate federal requirements is equally consistent with the text of § 136v.

## III

Against this background, we consider whether petitioners' claims[15] are pre-empted by § 136v(b), which, again, reads as

[14] As EPA's Website explains, "Federal law requires that before selling or distributing a pesticide in the United States, a person or company must obtain registration, or license, from EPA. . . . Most states conduct a review of the pesticide label to ensure that it complies with federal labeling requirements and any additional state restrictions of use." EPA, Pesticides: Regulating Pesticides, Evaluating Potential New Pesticides and Uses, http://www.epa.gov/pesticides/regulating/index.htm (as visited Apr. 6, 2005, and available in Clerk of Court's case file). See also 4 F. Grad, Treatise on Environmental Law § 8.05, p. 8–140 (2004) ("All the state[s] have some labeling requirements for pesticides, and these generally parallel [FIFRA] of 1947"); *id.*, at 8–143 to 8–218 (reviewing the pesticide statutes of the 50 States).

[15] The briefing and the record leave some confusion as to what precise claims are at issue. In light of the posture of this case, we find it appropriate to address the following claims: breach of express warranty, fraud, violation of the Texas DTPA, strict liability (including defective design and defective manufacture), and negligent testing. We will also address negligent failure to warn, since the Court of Appeals read petitioners' allegations to support such a claim. But because petitioners do not press such a claim here, we leave it to the court below to determine whether they may proceed on such a claim on remand. Of course, we express no

follows: "Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter."

The introductory words of § 136v(b)—"Such State"—appear to limit the coverage of that subsection to the States that are described in the preceding subsection (a). Texas is such a State because it regulates the sale and use of federally registered pesticides and does not permit any sales or uses prohibited by FIFRA. It is therefore beyond dispute that subsection (b) is applicable to this case.

The prohibitions in § 136v(b) apply only to "requirements." An occurrence that merely motivates an optional decision does not qualify as a requirement. The Court of Appeals was therefore quite wrong when it assumed that any event, such as a jury verdict, that might "induce" a pesticide manufacturer to change its label should be viewed as a requirement. The Court of Appeals did, however, correctly hold that the term "requirements" in § 136v(b) reaches beyond positive enactments, such as statutes and regulations, to embrace common-law duties. Our decision in *Cipollone* supports this conclusion. See 505 U. S., at 521 (plurality opinion) ("The phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules"); see also *id.*, at 548–549 (SCALIA, J., concurring in judgment in part and dissenting in part). While the use of "requirements" in a pre-emption clause may not invariably carry this meaning, we think this is the best reading of § 136v(b).

That § 136v(b) may pre-empt judge-made rules, as well as statutes and regulations, says nothing about the *scope* of that

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view as to whether any of these claims are viable as a matter of Texas law. Nor do we, given the early stage of this litigation, opine on whether petitioners can adduce sufficient evidence in support of their claims to survive summary judgment.

pre-emption. For a particular state rule to be pre-empted, it must satisfy two conditions. First, it must be a requirement *"for labeling or packaging"*; rules governing the design of a product, for example, are not pre-empted. Second, it must impose a labeling or packaging requirement that is *"in addition to or different from* those required under this subchapter." A state regulation requiring the word "poison" to appear in red letters, for instance, would not be pre-empted if an EPA regulation imposed the same requirement.

It is perfectly clear that many of the common-law rules upon which petitioners rely do not satisfy the first condition. Rules that require manufacturers to design reasonably safe products, to use due care in conducting appropriate testing of their products, to market products free of manufacturing defects, and to honor their express warranties or other contractual commitments plainly do not qualify as requirements for "labeling or packaging." None of these common-law rules requires that manufacturers label or package their products in any particular way. Thus, petitioners' claims for defective design, defective manufacture, negligent testing, and breach of express warranty are not pre-empted.

To be sure, Dow's express warranty was located on Strongarm's label.[16] But a cause of action on an express warranty asks only that a manufacturer make good on the contractual commitment that it voluntarily undertook by placing that warranty on its product.[17] Because this

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[16] The label stated: "Dow AgroSciences warrants that this product conforms to the chemical description on the label and is reasonably fit for the purposes stated on the label when used in strict accordance with the directions, subject to the inherent risks set forth below." App. 111.

[17] To the extent that petitioners' warranty and fraud claims are based on oral representations made by Dow's agents, they fall outside the text of § 136v(b) for an independent reason. Because FIFRA defines labeling as "all labels and all other written, printed, or graphic matter" that accompany a pesticide, § 136(p)(2), any requirement that applied to a sales agent's *oral* representations would not be a requirement for "labeling or packaging."

common-law rule does not require the manufacturer to make an express warranty, or in the event that the manufacturer elects to do so, to say anything in particular in that warranty, the rule does not impose a requirement "for labeling or packaging." See *id.*, at 525–526 (plurality opinion).[18]

In arriving at a different conclusion, the court below reasoned that a finding of liability on these claims would "induce Dow to alter [its] label." 332 F. 3d, at 332.[19] This effects-based test finds no support in the text of § 136v(b), which speaks only of "requirements." A requirement is a rule of law that must be obeyed; an event, such as a jury verdict, that merely motivates an optional decision is not a requirement. The proper inquiry calls for an examination of the elements of the common-law duty at issue, see *Cipollone*, 505 U. S., at 524 (plurality opinion); it does not call for speculation as to whether a jury verdict will prompt the manufacturer to take any particular action (a question, in any event, that will depend on a variety of cost/benefit calculations best left to the manufacturer's accountants).

The inducement test is unquestionably overbroad because it would impeach many "genuine" design defect claims that Dow concedes are not pre-empted. A design defect claim, if successful, would surely induce a manufacturer to alter its label to reflect a change in the list of ingredients or a change in the instructions for use necessitated by the improvement

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[18] The Court of Appeals held that petitioners' claim under the Texas DTPA was pre-empted insofar as the Act provides a remedy for the breach of an express warranty. 332 F. 3d 323, 332 (CA5 2003) (citing Texas law). Because petitioners' warranty claim is not pre-empted, their claim under the Act is not pre-empted to that extent.

[19] Other Courts of Appeals have taken a similar approach. See, *e. g.*, *Netland*, 284 F. 3d, at 900 ("Thus, our task is to determine whether Netland's claims are essentially a challenge to Bovinol's label or the overall design of the pesticide. To guide our analysis, we must ask whether in seeking to avoid liability for any error, would the manufacturer choose to alter the label or the product").

in the product's design. Moreover, the inducement test is not entirely consistent with § 136v(a), which confirms the State's broad authority to regulate the sale and use of pesticides.[20] Under § 136v(a), a state agency may ban the sale of a pesticide if it finds, for instance, that one of the pesticide's label-approved uses is unsafe. This ban might well induce the manufacturer to change its label to warn against this questioned use. Under the inducement test, however, such a restriction would anomalously qualify as a "labeling" requirement. It is highly unlikely that Congress endeavored to draw a line between the type of indirect pressure caused by a State's power to impose sales and use restrictions and the even more attenuated pressure exerted by common-law suits. The inducement test is not supported by either the text or the structure of the statute.

Unlike their other claims, petitioners' fraud and negligent-failure-to-warn claims are premised on common-law rules that qualify as "requirements for labeling or packaging." These rules set a standard for a product's labeling that the Strongarm label is alleged to have violated by containing false statements and inadequate warnings. While the courts of appeals have rightly found guidance in *Cipollone*'s interpretation of "requirements," some of those courts too quickly concluded that failure-to-warn claims were pre-empted under FIFRA, as they were in *Cipollone*, without paying attention to the rather obvious textual differences between the two pre-emption clauses.[21]

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[20] In *Wisconsin Public Intervenor* v. *Mortier*, 501 U. S. 597 (1991), we noted that § 136v(a) is merely declaratory of the authority that the States retained after FIFRA; that provision did not "serve to hand back to the States powers that the statute had impliedly usurped." *Id.*, at 614.

[21] See, *e. g.*, *Taylor AG Industries* v. *Pure-Gro*, 54 F. 3d 555, 559 (CA9 1995) ("There is no notable difference between the language in the 1969 Cigarette Act and the language in FIFRA"); *Shaw* v. *Dow Brands, Inc.*, 994 F. 2d 364, 371 (CA7 1993) ("Not even the most dedicated hair-splitter could distinguish these statements").

Unlike the pre-emption clause at issue in *Cipollone*,[22] § 136v(b) prohibits only state-law labeling and packaging requirements that are "*in addition to or different from*" the labeling and packaging requirements under FIFRA. Thus, a state-law labeling requirement is not pre-empted by § 136v(b) if it is equivalent to, and fully consistent with, FIFRA's misbranding provisions. Petitioners argue that their claims based on fraud and failure to warn are not pre-empted because these common-law duties are equivalent to FIFRA's requirements that a pesticide label not contain "false or misleading" statements, § 136(q)(1)(A), or inadequate instructions or warnings. §§ 136(q)(1)(F), (G). We agree with petitioners insofar as we hold that state law need not explicitly incorporate FIFRA's standards as an element of a cause of action in order to survive pre-emption. As we will discuss below, however, we leave it to the Court of Appeals to decide in the first instance whether these particular common-law duties are equivalent to FIFRA's misbranding standards.

The "parallel requirements" reading of § 136v(b) that we adopt today finds strong support in *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470 (1996). In addressing a similarly worded pre-emption provision in a statute regulating medical devices, we found that "[n]othing in [21 U. S. C.] § 360k denies Florida the right to provide a traditional damages remedy for violations of common-law duties when those duties parallel federal requirements." *Id.*, at 495.[23] As JUSTICE O'CONNOR

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[22] "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this [Act]." 15 U. S. C. § 1334(b); *Cipollone*, 505 U. S., at 515.

[23] We added: "Even if it may be necessary as a matter of Florida law to prove that those violations were the result of negligent conduct, or that they created an unreasonable hazard for users of the product, such additional elements of the state-law cause of action would make the state requirements narrower, not broader, than the federal requirement. While

explained in her separate opinion, a state cause of action that seeks to enforce a federal requirement "does not impose a requirement that is 'different from, or in addition to,' requirements under federal law. To be sure, the threat of a damages remedy will give manufacturers an additional cause to comply, but the requirements imposed on them under state and federal law do not differ. Section 360k does not preclude States from imposing different or additional *remedies*, but only different or additional *requirements*." *Id.*, at 513 (opinion concurring in part and dissenting in part). Accordingly, although FIFRA does not provide a federal remedy to farmers and others who are injured as a result of a manufacturer's violation of FIFRA's labeling requirements, nothing in § 136v(b) precludes States from providing such a remedy.

Dow, joined by the United States as *amicus curiae*, argues that the "parallel requirements" reading of § 136v(b) would "give juries in 50 States the authority to give content to FIFRA's misbranding prohibition, establishing a crazy-quilt of anti-misbranding requirements different from the one defined by FIFRA itself and intended by Congress to be interpreted authoritatively by EPA." Brief for Respondent 16; see also Brief for United States as *Amicus Curiae* 25–27. In our view, however, the clear text of § 136v(b) and the authority of *Medtronic* cannot be so easily avoided. Conspicuously absent from the submissions by Dow and the United States is any plausible alternative interpretation of "in addition to or different from" that would give that phrase meaning. Instead, they appear to favor reading those words out of the statute, which would leave the following: "Such State shall not impose or continue in effect any requirements for

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such a narrower requirement might be 'different from' the federal rules in a literal sense, such a difference would surely provide a strange reason for finding pre-emption of a state rule insofar as it duplicates the federal rule." 518 U. S., at 495.

labeling or packaging." This amputated version of § 136v(b) would no doubt have clearly and succinctly commanded the pre-emption of *all* state requirements concerning labeling. That Congress added the remainder of the provision is evidence of its intent to draw a distinction between state labeling requirements that are pre-empted and those that are not.

Even if Dow had offered us a plausible alternative reading of § 136v(b)—indeed, even if its alternative were just as plausible as our reading of that text—we would nevertheless have a duty to accept the reading that disfavors pre-emption. "[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action." *Medtronic*, 518 U. S., at 485. In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention "'clear and manifest.'" *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645, 655 (1995) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)); see also *Medtronic*, 518 U. S., at 485. Our reading is at once the only one that makes sense of each phrase in § 136v(b) and the one favored by our canons of interpretation. The notion that FIFRA contains a nonambiguous command to pre-empt the types of tort claims that parallel FIFRA's misbranding requirements is particularly dubious given that just five years ago the United States advocated the interpretation that we adopt today.[24]

The long history of tort litigation against manufacturers of poisonous substances adds force to the basic presumption against pre-emption. If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly. See

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[24] Brief *Amicus Curiae* for United States in *Etcheverry* 33–35. See also Brief for United States as *Amicus Curiae* 20 (explaining its subsequent change in view).

*Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238, 251 (1984).[25] Moreover, this history emphasizes the importance of providing an incentive to manufacturers to use the utmost care in the business of distributing inherently dangerous items. See *Mortier*, 501 U. S., at 613 (stating that the 1972 amendments' goal was to "strengthen existing labeling requirements and ensure that these requirements were followed in practice"). Particularly given that Congress amended FIFRA to allow EPA to waive efficacy review of newly registered pesticides (and in the course of those amendments made technical changes to § 136v(b)), it seems unlikely that Congress considered a relatively obscure provision like § 136v(b) to give pesticide manufacturers virtual immunity from certain forms of tort liability. Overenforcement of FIFRA's misbranding prohibition creates a risk of imposing unnecessary financial burdens on manufacturers; underenforcement creates not only financial risks for consumers, but risks that affect their safety and the environment as well.

Finally, we find the policy objections raised against our reading of § 136v(b) to be unpersuasive. Dow and the United States greatly overstate the degree of uniformity and centralization that characterizes FIFRA. In fact, the statute authorizes a relatively decentralized scheme that preserves a broad role for state regulation. See *ibid.* Most significantly, States may ban or restrict the uses of pesticides that EPA has approved, § 136v(a); they may also register, subject to certain restrictions, pesticides for uses beyond those approved by EPA, § 136v(c). See also § 136w–1 (authorizing EPA to grant States primary enforcement responsibility for use violations). A literal reading of § 136v(b)

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[25] It is no answer that, even if all label-related claims are pre-empted under Dow's reading, other non-label-related tort claims would remain intact. Given the inherently dangerous nature of pesticides, most safety gains are achieved not through modifying a pesticide's design, but by improving the warnings and instructions contained on its label. See Brief for American Chemistry Council as *Amicus Curiae* 3.

is fully consistent with the concurrent authority of the Federal and State Governments in this sphere.

Private remedies that enforce federal misbranding requirements would seem to aid, rather than hinder, the functioning of FIFRA. Unlike the cigarette labeling law at issue in *Cipollone*, which prescribed certain immutable warning statements, FIFRA contemplates that pesticide labels will evolve over time, as manufacturers gain more information about their products' performance in diverse settings. As one court explained, tort suits can serve as a catalyst in this process:

> "By encouraging plaintiffs to bring suit for injuries not previously recognized as traceable to pesticides such as [the pesticide there at issue], a state tort action of the kind under review may aid in the exposure of new dangers associated with pesticides. Successful actions of this sort may lead manufacturers to petition EPA to allow more detailed labelling of their products; alternatively, EPA itself may decide that revised labels are required in light of the new information that has been brought to its attention through common law suits. In addition, the specter of damage actions may provide manufacturers with added dynamic incentives to continue to keep abreast of all possible injuries stemming from use of their product so as to forestall such actions through product improvement." *Ferebee*, 736 F. 2d, at 1541–1542.

Dow and the United States exaggerate the disruptive effects of using common-law suits to enforce the prohibition on misbranding. FIFRA has prohibited inaccurate representations and inadequate warnings since its enactment in 1947, while tort suits alleging failure-to-warn claims were common well before that date and continued beyond the 1972 amendments. We have been pointed to no evidence that such tort suits led to a "crazy-quilt" of FIFRA standards or otherwise

created any real hardship for manufacturers or for EPA. Indeed, for much of this period EPA appears to have welcomed these tort suits. While it is true that properly instructed juries might on occasion reach contrary conclusions on a similar issue of misbranding, there is no reason to think such occurrences would be frequent or that they would result in difficulties beyond those regularly experienced by manufacturers of other products that every day bear the risk of conflicting jury verdicts. Moreover, it bears noting that lay juries are in no sense anathema to FIFRA's scheme: In criminal prosecutions for violation of FIFRA's provisions, see § 136*l*(b), juries necessarily pass on allegations of misbranding.

In sum, under our interpretation, § 136v(b) retains a narrow, but still important, role. In the main, it pre-empts competing state labeling standards—imagine 50 different labeling regimes prescribing the color, font size, and wording of warnings—that would create significant inefficiencies for manufacturers.[26] The provision also pre-empts any statutory or common-law rule that would impose a labeling requirement that diverges from those set out in FIFRA and its implementing regulations. It does not, however, pre-empt any state rules that are fully consistent with federal requirements.

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[26] The legislative history of the 1972 amendments suggests that Congress had conflicting state labeling regulations in mind when crafting § 136v(b). As one industry representative testified: "Some States might want the word 'flammable,' some 'inflammable.' . . . Some States might want red lettering; others orange, another yellow, and so forth. We ask this committee, therefore, to recognize, as the Congress has in a number of similar regulatory statutes, the industry's need for uniformity by providing for this in the act." Hearings on Federal Pesticide Control Act of 1971 before the House Committee on Agriculture, 92d Cong., 1st Sess., 281–283 (1971) (statement of Robert L. Ackerly). By contrast, the lengthy legislative history is barren of any indication that Congress meant to abrogate most of the common-law duties long owed by pesticide manufacturers.

Having settled on our interpretation of § 136v(b), it still remains to be decided whether that provision pre-empts petitioners' fraud and failure-to-warn claims. Because we have not received sufficient briefing on this issue,[27] which involves questions of Texas law, we remand it to the Court of Appeals. We emphasize that a state-law labeling requirement must in fact be equivalent to a requirement under FIFRA in order to survive pre-emption. For example, were the Court of Appeals to determine that the element of falsity in Texas' common-law definition of fraud imposed a broader obligation than FIFRA's requirement that labels not contain "false or misleading statements," that state-law cause of action would be pre-empted by § 136v(b) to the extent of that difference. State-law requirements must also be measured against any relevant EPA regulations that give content to FIFRA's misbranding standards. For example, a failure-to-warn claim alleging that a given pesticide's label should have stated "DANGER" instead of the more subdued "CAUTION" would be pre-empted because it is inconsistent with 40 CFR § 156.64 (2004), which specifically assigns these warnings to particular classes of pesticides based on their toxicity.[28]

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[27] Dow does not seem to argue that, by their terms, Texas' fraud and failure-to-warn causes of action are not equivalent to FIFRA's misbranding standards. Nor has Dow identified any EPA regulations that further refine those general standards in any way that is relevant to petitioners' allegations. Rather, Dow has chosen to mount a broader attack on the "parallel requirements" interpretation, thus seeming to argue for the pre-emption of even a state-law cause of action that *expressly* incorporates FIFRA's misbranding provisions. See Brief for Respondent 38, n. 25. Since Dow did not have the benefit of our construction of § 136v(b), Dow should be allowed to address these matters on remand.

[28] At present, there appear to be relatively few regulations that refine or elaborate upon FIFRA's broadly phrased misbranding standards. To the extent that EPA promulgates such regulations in the future, they will necessarily affect the scope of pre-emption under § 136v(b).

In undertaking a pre-emption analysis at the pleadings stage of a case, a court should bear in mind the concept of equivalence. To survive pre-emption, the state-law requirement need not be phrased in the *identical* language as its corresponding FIFRA requirement; indeed, it would be surprising if a common-law requirement used the same phraseology as FIFRA. If a case proceeds to trial, the court's jury instructions must ensure that nominally equivalent labeling requirements are *genuinely* equivalent. If a defendant so requests, a court should instruct the jury on the relevant FIFRA misbranding standards, as well as any regulations that add content to those standards. For a manufacturer should not be held liable under a state labeling requirement subject to § 136v(b) unless the manufacturer is also liable for misbranding as defined by FIFRA.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE BREYER, concurring.

I write separately to stress the practical importance of the Court's statement that state-law requirements must "be measured against" relevant Environmental Protection Agency (EPA) regulations "that give content to [the Federal Insecticide, Fungicide, and Rodenticide Act's (FIFRA)] misbranding standards." *Ante*, at 453. In *Medtronic, Inc.* v. *Lohr*, 518 U. S. 470 (1996), I pointed out that an administrative agency, there the Food and Drug Administration, had the legal authority within ordinary administrative constraints to promulgate agency rules and to determine the pre-emptive effect of those rules in light of the agency's special understanding of "whether (or the extent to which) state requirements may interfere with federal objectives." *Id.*, at 506 (opinion concurring in part and concurring in judgment). The EPA enjoys similar authority here. See 7 U. S. C.

§ 136w(a)(1). As suggested by *Medtronic*, the federal agency charged with administering the statute is often better able than are courts to determine the extent to which state liability rules mirror or distort federal requirements. Thus, the EPA may prove better able than are courts to determine whether general state tort liability rules simply help to expose "'new dangers associated with pesticides,'" *ante*, at 451 (quoting *Ferebee* v. *Chevron Chemical Co.*, 736 F. 2d 1529, 1541 (CADC 1984)), or instead bring about a counterproductive "'crazy-quilt of anti-misbranding requirements,'" *ante*, at 448 (quoting Brief for Respondent 16). And, within appropriate legal and administrative constraints, it can act accordingly. Cf. *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U. S. 707, 721 (1985) (agencies can monitor the dynamic between federal and local requirements and promulgate regulations pre-empting local legislation that interferes with federal goals). Emphasizing the importance of the agency's role in overseeing FIFRA's future implementation, I join the Court's opinion.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in the judgment in part and dissenting in part.

I agree with the Court that the term "requirements" in § 24(b) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U. S. C. § 136v(b), includes common-law duties for labeling or packaging. *Ante*, at 443. I also agree that state-law damages claims may not impose requirements "in addition to or different from" FIFRA's. *Ante*, at 452–454. While States are free to impose liability predicated on a violation of the federal standards set forth in FIFRA and in any accompanying regulations promulgated by the Environmental Protection Agency, they may not impose liability for labeling requirements predicated on distinct state standards of care. Section 136v(b) permits States to add remedies—not to alter or augment the substantive rules governing liability for labeling. See *Medtronic, Inc.* v. *Lohr*, 518

U. S. 470, 513 (1996) (O'CONNOR, J., concurring in part and dissenting in part). Because the parties have not argued that Dow violated FIFRA's labeling standards,* the majority properly remands for the District Court to consider whether Texas law mirrors the federal standards.

However, the majority omits a step in its reasoning that should be made explicit: A state-law cause of action, even if not specific to labeling, nevertheless imposes a labeling requirement "in addition to or different from" FIFRA's when it attaches liability to statements on the label that do not produce liability under FIFRA. The state-law cause of action then adds some supplemental requirement of truthfulness to FIFRA's requirement that labeling statements not be "false or misleading." 7 U. S. C. § 136(q)(1)(A). That is why the fraud claims here are properly remanded to determine whether the state and federal standards for liability-incurring statements are, in their application to this case, the same. See *ante*, at 453–454.

Under that reasoning, the majority mistreats two sets of petitioners' claims. First, petitioners' breach-of-warranty claims should be remanded for pre-emption analysis, contrary to the majority's disposition, see *ante*, at 444–445. To the extent that Texas' law of warranty imposes liability for statements on the label where FIFRA would not, Texas' law is pre-empted. See *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. 504, 551 (1992) (SCALIA, J., concurring in judgment in part and dissenting in part). Second, the majority holds that petitioners' claim under the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA) is not pre-empted to the extent it is a breach-of-warranty claim. *Ante*, at 445, n. 18. However, the DTPA claim is also (and, in fact, perhaps exclusively) a claim for false or misleading representations on the label. App. 185–186. Therefore, all aspects of the DTPA claim should be remanded. The DTPA claim,

*Petitioners' counterclaim expressly disclaims that Dow violated any provision of FIFRA. App. 192 (First Amended Counterclaim).

like petitioners' fraud claims, should be pre-empted insofar as it imposes liability for label content where FIFRA would not.

I also note that, despite the majority's reference to a failure-to-warn claim, *ante*, at 442–443, n. 15, petitioners have not advanced an actual failure-to-warn claim. Instead, the Court of Appeals treated petitioners' claims for negligent testing and defective design and manufacture as "disguised claim[s] for failure to warn." 332 F. 3d 323, 332–333 (CA5 2003). If petitioners offer no evidence on remand that Dow erred in the testing, design, or manufacture of Strongarm, these claims will fail on the merits. On that point, I take the majority to agree. *Ante*, at 442–443, n. 15.

We need go no further to resolve this case. The ordinary meaning of § 136v(b)'s terms makes plain that some of petitioners' state-law causes of action may be pre-empted. Yet the majority advances several arguments designed to tip the scales in favor of the States and against the Federal Government. These arguments, in addition to being unnecessary, are unpersuasive. For instance, the majority states that the presumption against pre-emption requires choosing the interpretation of § 136v(b) that disfavors pre-emption. *Ante*, at 449. That presumption does not apply, however, when Congress has included within a statute an express pre-emption provision. See *Cipollone* v. *Liggett Group, Inc.*, *supra*, at 545–546 (SCALIA, J., concurring in judgment in part and dissenting in part); Nelson, Preemption, 86 Va. L. Rev. 225, 291–292, 298–303 (2000). Section 136v(b) is an explicit statement that FIFRA pre-empts some state-law claims. Thus, our task is to determine which state-law claims § 136v(b) pre-empts, without slanting the inquiry in favor of either the Federal Government or the States.

The history of tort litigation against manufacturers is also irrelevant. *Ante*, at 449–450. We cannot know, without looking to the text of § 136v(b), whether FIFRA preserved that tradition or displaced it. The majority notes that Con-

gress must have intended to preserve common-law suits, because the legislative history does not indicate that Congress meant to abrogate such suits. *Ante*, at 452, n. 26; see also *Small* v. *United States*, *ante*, at 406 (THOMAS, J., dissenting) (criticizing novel practice of relying on silence in the legislative history); *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U. S. 50, 73–74 (2004) (SCALIA, J., dissenting) (same). For the Court, then, enacting a pre-emption provision is not enough: Either Congress must speak with added specificity in the statute (to avoid the presumption against pre-emption) or some individual Members of Congress or congressional committees must display their preference for pre-emption in the legislative record (to avoid a new canon of congressional silence). But the Court does not believe its own test, for it agrees that § 136v(b) stands to abrogate many common-law causes of action. On remand, for example, petitioners may be unable to pursue a traditional common-law suit under Texas' law of fraud. Finally, while allowing additional state-law remedies likely aids in enforcing FIFRA's misbranding requirements, *ante*, at 451, it is for Congress, not this Court, to strike a balance between state tort suits and federal regulation.

Because we need only determine the ordinary meaning of § 136v(b), the majority rightly declines to address respondent's argument that petitioners' claims are subject to other types of pre-emption. Brief for Respondent 36–37. For instance, the majority does not ask whether FIFRA's regulatory scheme is "so pervasive," and the federal interest in labeling "so dominant," that there is no room for States to provide additional remedies. *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947). Nor does the majority ask whether enforcement of state-law labeling claims would "stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting FIFRA. *Hines* v. *Davidowitz*, 312 U. S. 52, 67 (1941).

Today's decision thus comports with this Court's increasing reluctance to expand federal statutes beyond their terms through doctrines of implied pre-emption. See *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U. S. 564, 617 (1997) (THOMAS, J., dissenting). This reluctance reflects that pre-emption analysis is not "[a] freewheeling judicial inquiry into whether a state statute is in tension with federal objectives," *Gade* v. *National Solid Wastes Management Assn.*, 505 U. S. 88, 111 (1992) (KENNEDY, J., concurring in part and concurring in judgment), but an inquiry into whether the ordinary meanings of state and federal law conflict.

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# GRANHOLM, GOVERNOR OF MICHIGAN, ET AL. *v.* HEALD ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03–1116. Argued December 7, 2004—Decided May 16, 2005*

Michigan and New York regulate the sale and importation of wine through three-tier systems requiring separate licenses for producers, wholesalers, and retailers. These schemes allow in-state, but not out-of-state, wineries to make direct sales to consumers. This differential treatment explicitly discriminates against interstate commerce by limiting the emerging and significant direct-sale business. Influenced by an increasing number of small wineries and a decreasing number of wine wholesalers, direct sales have grown because small wineries may not produce enough wine or have sufficient consumer demand for their wine to make it economical for wholesalers to carry their products. In Nos. 03–1116 and 03–1120, Michigan residents, joined by an intervening out-of-state winery, sued Michigan officials, claiming that the State's laws violate the Commerce Clause. The State and an intervening in-state wholesalers association responded that the direct-shipment ban was a valid exercise of Michigan's power under the Twenty-first Amendment. The District Court sustained the scheme, but the Sixth Circuit reversed, rejecting the argument that the Twenty-first Amendment immunizes state liquor laws from Commerce Clause strictures and holding that there was no showing that the State could not meet its proffered policy objectives through nondiscriminatory means. In No. 03–1274, out-of-state wineries and their New York customers filed suit against state officials, seeking, *inter alia*, a declaration that the State's direct-shipment laws violate the Commerce Clause. State liquor wholesalers and retailers' representatives intervened in support of the State. The District Court granted the plaintiffs summary judgment, but the Second Circuit reversed, holding that New York's laws fell within the ambit of its powers under the Twenty-first Amendment. Here, respondents in the Michigan cases and petitioners in the New

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*Together with No. 03–1120, *Michigan Beer & Wine Wholesalers Assn.* v. *Heald et al.*, also on certiorari to the same court, and No. 03–1274, *Swedenburg et al.* v. *Kelly, Chairman, New York Division of Alcoholic Beverage Control, State Liquor Authority, et al.*, on certiorari to the United States Court of Appeals for the Second Circuit.

York case are referred to as the wineries, while the opposing parties are referred to as the States.

*Held:* Both States' laws discriminate against interstate commerce in violation of the Commerce Clause, and that discrimination is neither authorized nor permitted by the Twenty-first Amendment. Pp. 472–493.

(a) This Court has long held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality of Ore.*, 511 U. S. 93, 99. Laws such as those at issue contradict the principles underlying this rule by depriving citizens of their right to have access to other States' markets on equal terms. The Michigan system's discriminatory character is obvious. It allows in-state wineries to ship directly to consumers, subject only to a licensing requirement, but out-of-state wineries, even if licensed, must go through a wholesaler and retailer. The resulting price differential, plus the possible inability to secure a wholesaler for small shipments, can effectively bar small wineries from Michigan's market. New York's scheme also grants in-state wineries access to state consumers on preferential terms. It allows in-state wineries to ship directly to consumers, but requires an out-of-state winery to open a New York branch office and warehouse, which drives up its costs. Out-of-state wineries are also ineligible for a "farm winery" license, which provides the most direct means of shipping to New York consumers. Pp. 472–476.

(b) Section 2 of the Twenty-first Amendment does not allow States to regulate direct shipment of wine on terms that discriminate in favor of in-state producers. The States' position is inconsistent with this Court's precedents and the Amendment's history. Pp. 476–489.

(1) This Court invalidated many state liquor regulations before the Eighteenth Amendment's ratification, finding either that the Commerce Clause prevented States from discriminating against imported liquor, *Scott* v. *Donald*, 165 U. S. 58, or that States could not pass facially neutral laws that placed an impermissible burden on interstate commerce, *Bowman* v. *Chicago & Northwestern R. Co.*, 125 U. S. 465. While States could ban domestic liquor production, *Mugler* v. *Kansas*, 123 U. S. 623, such laws were ineffective because they could not regulate imported liquor in its original package, *Leisy* v. *Hardin*, 135 U. S. 100. To resolve this matter, Congress passed the Wilson Act, which empowered the States to regulate imported liquor on the same terms as domestic liquor. After this Court narrowly construed the Act to permit regulation of the resale of imported liquor, not its direct shipment to consum-

ers, *Rhodes* v. *Iowa*, 170 U. S. 412, Congress passed the Webb-Kenyon Act to close the direct-shipment loophole, see *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311. The States argue that the Webb-Kenyon Act went further, removing any barrier to discriminatory state liquor regulations, but that reading conflicts with *Clark Distilling*'s description of the Webb-Kenyon Act's purpose, which was simply to extend the Wilson Act. Nor does the statute's text compel a different response. At the very least, it expresses no clear congressional intent to depart from the principle disfavoring discrimination against out-of-state goods. Last, and most importantly, the Webb-Kenyon Act did not purport to repeal the Wilson Act, which expressly precludes state discrimination. The Wilson Act reaffirmed, and the Webb-Kenyon Act did not displace, the Court's Commerce Clause cases striking down state laws that discriminated against out-of-state liquor. States were required to regulate domestic and imported liquor on equal terms. Pp. 476–484.

(2) A brief respite from these legal battles brought on by the Eighteenth Amendment's ratification ended with the Twenty-first Amendment. The States contend that §2 of the Twenty-first Amendment transfers to States the authority to discriminate against out-of-state goods, but the pre-Amendment history recited here provides strong support for the view that §2 only restored to the States the powers they had under the Wilson and Webb-Kenyon Acts. The Twenty-first Amendment's aim was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. It did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they never enjoyed. Cases decided soon after the Twenty-first Amendment's ratification did not take account of the underlying history and were inconsistent with this view, *e. g.*, *State Bd. of Equalization of Cal.* v. *Young's Market Co.*, 299 U. S. 59, but the Court's reluctance to consider this history did not reflect a consensus that such evidence was irrelevant or that prior history was unsupportive of the principle that the Amendment did not authorize discrimination against out-of-state liquor. More recent cases confirm that the Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference to their own producers. Pp. 484–486.

(3) This Court has held, in the modern §2 cases, (1) that state laws violating other provisions of the Constitution are not saved by the Twenty-first Amendment, *e. g.*, *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484, (2) that §2 does not abrogate Congress' Commerce Clause powers with regard to liquor, *e. g.*, *Capital Cities Cable, Inc.* v. *Crisp*,

Syllabus

467 U. S. 691, and (3) as most relevant here, that state regulation of alcohol is limited by the Commerce Clause's nondiscrimination principle, *e. g.*, *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263, 276. *Bacchus*, which dealt with a Hawaii excise tax exempting some in-state alcoholic beverages, provides a particularly telling example of this last proposition, and this Court declines the States' suggestion to overrule or limit that case. The decision to invalidate the instant direct-shipment laws also does not call into question their three-tier systems' constitutionality, see *North Dakota* v. *United States*, 495 U. S. 423, 432. State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent. In contrast, the instant cases involve straightforward attempts to discriminate in favor of local producers. Pp. 486–489.

(c) Concluding that the States' direct-shipment laws are not authorized by the Twenty-first Amendment does not end the inquiry, for this Court must still consider whether either State's regime "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives," *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269, 278. The States provide little evidence for their claim that purchasing wine over the Internet by minors is a problem. The 26 States now permitting direct shipments report no such problem, and the States can minimize any risk with less restrictive steps, such as requiring an adult signature on delivery. The States' tax evasion justification is also insufficient. Increased direct shipment, whether in or out of state, brings the potential for tax evasion. However, this argument is a diversion with regard to Michigan, which does not rely on in-state wholesalers to collect taxes on out-of-state wines. New York's tax collection objectives can be achieved without discriminating against interstate commerce, *e. g.*, by requiring a permit as a condition of direct shipping, which is what it does for in-state wineries. Both States also benefit from federal laws that supply incentives for wineries to comply with state regulations. Other rationales—facilitating orderly market conditions, protecting public health and safety, and ensuring regulatory accountability—can also be achieved through the alternative of an even-handed licensing requirement. Pp. 489–493.

Nos. 03–1116 and 03–1120, 342 F. 3d 517, affirmed; No. 03–1274, 358 F. 3d 223, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which SCALIA, SOUTER, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post*, p. 493. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and STEVENS and O'CONNOR, JJ., joined, *post*, p. 497.

Counsel

*Clint Bolick* argued the cause for petitioners in No. 03–1274. With him on the briefs were *William H. Mellor*, *Steven M. Simpson*, and *Lance J. Gotko*. *Kathleen M. Sullivan* argued the cause for respondents in Nos. 03–1116 and 03–1120. With her on the brief were *James A. Tanford*, *Robert D. Epstein*, and *Kenneth W. Starr*.

*Thomas L. Casey*, Solicitor General of Michigan, argued the cause for petitioners in Nos. 03–1116 and 03–1120. With him on the briefs in No. 03–1116 were *Michael A. Cox*, Attorney General, and *Donald S. McGehee*, Assistant Attorney General. *Anthony S. Kogut*, *John A. Yeager*, *Curtis R. Hadley*, *Louis R. Cohen*, *C. Boyden Gray*, and *Todd Zubler* filed a brief for petitioner in No. 03–1120. *Caitlin J. Halligan*, Solicitor General of New York, argued the cause for respondents in No. 03–1274. With her on the brief for the state respondents were *Eliot Spitzer*, Attorney General, *Daniel Smirlock*, Deputy Solicitor General, and *Gregory Klass* and *Shaifali Puri*, Assistant Solicitors General.

*Miguel A. Estrada*, *Mark A. Perry*, *Howard Graff*, *Victoria A. Kummer*, *Robert M. Heller*, *J. Warren Mangan*, and *Alan J. Gardner* filed a brief for the private respondents.†

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†Briefs of *amici curiae* urging reversal in No. 03–1116 were filed for the State of Ohio et al. by *Jim Petro*, Attorney General of Ohio, *Douglas R. Cole*, State Solicitor, *Stephen P. Carney*, Senior Deputy Solicitor, and *Peter M. Thomas*, Assistant Solicitor, and by the Attorneys General for their respective jurisdictions as follows: *Troy King* of Alabama, *Mike Beebe* of Arkansas, *Richard Blumenthal* of Connecticut, *M. Jane Brady* of Delaware, *Robert J. Spagnoletti* of the District of Columbia, *Charlie Crist* of Florida, *Thurbert E. Baker* of Georgia, *Mark J. Bennett* of Hawaii, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Phill Kline* of Kansas, *Gregory D. Stumbo* of Kentucky, *Charles C. Foti, Jr.*, of Louisiana, *G. Steven Rowe* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Mike Hatch* of Minnesota, *Jim Hood* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Jon Bruning* of Nebraska, *Brian Sandoval* of Nevada, *Peter C. Harvey* of New Jersey, *Wayne Stenehjem* of North Dakota, *Gerald J. Pappert* of Pennsylvania, *Patrick Lynch* of Rhode Island, *Lawrence E. Long* of South Dakota, *Paul G. Summers* of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, and *Peggy A. Lautenschlager* of

JUSTICE KENNEDY delivered the opinion of the Court.

These consolidated cases present challenges to state laws regulating the sale of wine from out-of-state wineries to consumers in Michigan and New York. The details and me-

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Wisconsin; in Nos. 03–1116 and 03–1120 for the Michigan Association of Secondary School Principals et al. by *Eric J. Eggan* and *Irene M. Mead;* and in No. 03–1274 for the Virginia Wineries Association by *Thomas A. Bowden, Randy E. Barnett, Richard A. Epstein,* and *Susan Beth Farmer.*

Briefs of *amici curiae* urging affirmance in No. 03–1116 were filed for the State of California et al. by *Bill Lockyer,* Attorney General of California, and *Manuel M. Medeiros,* Solicitor General, *Christine O. Gregoire,* Attorney General of Washington, and *Narda Pierce,* Solicitor General, *Patricia A. Madrid,* Attorney General of New Mexico, *Hardy Myers,* Attorney General of Oregon, and *Darrell V. McGraw, Jr.,* Attorney General of West Virginia; and for the Wine Institute by *James M. Seff* and *Kevin M. Fong;* and in No. 03–1274 for the Beer Institute by *Steven G. Brody* and *James K. Goldfarb.*

Briefs of *amici curiae* urging affirmance in Nos. 03–1116 and 03–1120 were filed for Members of the United States Congress by *John L. Oberdorfer* and *Roy T. Englert, Jr.;* for the American Homeowners Alliance et al. by *Paul Bender, Michael R. Klipper, Christopher A. Mohr,* and *Steven J. Metalitz;* for the Cargo Airline Association by *Drew S. Days III, Beth S. Brinkmann, Seth M. Galanter, Paul T. Friedman, Ruth N. Borenstein,* and *Stephen A. Alterman;* for the DKT Liberty Project by *William H. Hohengarten* and *Julia M. Carpenter;* for the Goldwater Institute by *Mark Brnovich;* for Napa Valley Vintners et al. by *Carter G. Phillips* and *Mark E. Haddad;* for WineAmerica, Inc., et al. by *Robert P. Mahnke, Susan Estrich,* and *James N. Czaban;* and for George A. Akerlof et al. by *Stuart Banner.*

Briefs of *amici curiae* urging affirmance in No. 03–1274 and reversal in Nos. 03–1116 and 03–1120 were filed in all cases for the Illinois Alcoholism and Drug Dependence Association by *Claudette P. Miller;* and for the Wine and Spirits Wholesalers of America et al. by *H. Bartow Farr III, Viet D. Dinh,* and *M. Craig Wolf; James M. Goldberg* filed a brief in all cases for the National Alcohol Beverage Control Association et al. as *amici curiae* urging reversal in Nos. 03–1116 and 03–1120.

*Michael D. Madigan, Katherine E. Becker, Stephen M. Diamond,* and *Paul R. Romain* filed a brief as *amicus curiae* for the National Beer Wholesalers Association in Nos. 03–1116 and 03–1120 urging reversal in both cases and affirmance in No. 03–1274.

*Robert S. Getman* filed a brief for Millbrook Vineyards & Winery as *amicus curiae* in No. 03–1274.

chanics of the two regulatory schemes differ, but the object and effect of the laws are the same: to allow in-state wineries to sell wine directly to consumers in that State but to prohibit out-of-state wineries from doing so, or, at the least, to make direct sales impractical from an economic standpoint. It is evident that the object and design of the Michigan and New York statutes is to grant in-state wineries a competitive advantage over wineries located beyond the States' borders.

We hold that the laws in both States discriminate against interstate commerce in violation of the Commerce Clause, Art. I, § 8, cl. 3, and that the discrimination is neither authorized nor permitted by the Twenty-first Amendment. Accordingly, we affirm the judgment of the Court of Appeals for the Sixth Circuit, which invalidated the Michigan laws; and we reverse the judgment of the Court of Appeals for the Second Circuit, which upheld the New York laws.

## I

Like many other States, Michigan and New York regulate the sale and importation of alcoholic beverages, including wine, through a three-tier distribution system. Separate licenses are required for producers, wholesalers, and retailers. See FTC, Possible Anticompetitive Barriers to E-Commerce: Wine 5–7 (July 2003) (hereinafter FTC Report), available at http://www.ftc.gov/os/2003/07/winereport2.pdf (all Internet materials as visited May 11, 2005, and available in Clerk of Court's case file). The three-tier scheme is preserved by a complex set of overlapping state and federal regulations. For example, both state and federal laws limit vertical integration between tiers. *Id.*, at 5; 27 U. S. C. § 205; see, *e. g.*, *Bainbridge* v. *Turner*, 311 F. 3d 1104, 1106 (CA11 2002). We have held previously that States can mandate a three-tier distribution scheme in the exercise of their authority under the Twenty-first Amendment. *North Dakota* v. *United States*, 495 U. S. 423, 432 (1990); *id.*, at 447 (SCALIA, J., concurring in judgment). As relevant to today's cases, though,

the three-tier system is, in broad terms and with refinements to be discussed, mandated by Michigan and New York only for sales from out-of-state wineries. In-state wineries, by contrast, can obtain a license for direct sales to consumers. The differential treatment between in-state and out-of-state wineries constitutes explicit discrimination against interstate commerce.

This discrimination substantially limits the direct sale of wine to consumers, an otherwise emerging and significant business. FTC Report 7. From 1994 to 1999, consumer spending on direct wine shipments doubled, reaching $500 million per year, or three percent of all wine sales. *Id.*, at 5. The expansion has been influenced by several related trends. First, the number of small wineries in the United States has significantly increased. By some estimates there are over 3,000 wineries in the country, WineAmerica, The National Association of American Wineries, Wine Facts 2004, http://www.americanwineries.org/newsroom/winefacts04.htm, more than three times the number 30 years ago, FTC Report 6. At the same time, the wholesale market has consolidated. Between 1984 and 2002, the number of licensed wholesalers dropped from 1,600 to 600. Riekhof & Sykuta, Regulating Wine by Mail, 27 Regulation, No. 3, pp. 30, 31 (Fall 2004), available at http://www.cato.org/pubs/regulation/regv27n3/v27n3-3.pdf. The increasing winery-to-wholesaler ratio means that many small wineries do not produce enough wine or have sufficient consumer demand for their wine to make it economical for wholesalers to carry their products. FTC Report 6. This has led many small wineries to rely on direct shipping to reach new markets. Technological improvements, in particular the ability of wineries to sell wine over the Internet, have helped make direct shipments an attractive sales channel.

Approximately 26 States allow some direct shipping of wine, with various restrictions. Thirteen of these States have reciprocity laws, which allow direct shipment from win-

eries outside the State, provided the State of origin affords similar nondiscriminatory treatment. *Id.*, at 7–8. In many parts of the country, however, state laws that prohibit or severely restrict direct shipments deprive consumers of access to the direct market. According to the Federal Trade Commission (FTC), "[s]tate bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine." *Id.*, at 3.

The wine producers in the cases before us are small wineries that rely on direct consumer sales as an important part of their businesses. Domaine Alfred, one of the plaintiffs in the Michigan suit, is a small winery located in San Luis Obispo, California. It produces 3,000 cases of wine per year. Domaine Alfred has received requests for its wine from Michigan consumers but cannot fill the orders because of the State's direct-shipment ban. Even if the winery could find a Michigan wholesaler to distribute its wine, the wholesaler's markup would render shipment through the three-tier system economically infeasible.

Similarly, Juanita Swedenburg and David Lucas, two of the plaintiffs in the New York suit, operate small wineries in Virginia (the Swedenburg Estate Vineyard) and California (the Lucas Winery). Some of their customers are tourists, from other States, who purchase wine while visiting the wineries. If these customers wish to obtain Swedenburg or Lucas wines after they return home, they will be unable to do so if they reside in a State with restrictive direct-shipment laws. For example, Swedenburg and Lucas are unable to fill orders from New York, the Nation's second-largest wine market, because of the limits that State imposes on direct wine shipments.

## A

We first address the background of the suit challenging the Michigan direct-shipment law. Most alcoholic beverages in Michigan are distributed through the State's three-tier

system. Producers or distillers of alcoholic beverages, whether located in state or out of state, generally may sell only to licensed in-state wholesalers. Mich. Comp. Laws Ann. §§436.1109(1), 436.1305, 436.1403, 436.1607(1) (West 2000); Mich. Admin. Code Rules 436.1705 (1990), 436.1719 (2000). Wholesalers, in turn, may sell only to in-state retailers. Mich. Comp. Laws Ann. §§436.1113(7), 436.1607(1) (West 2001). Licensed retailers are the final link in the chain, selling alcoholic beverages to consumers at retail locations and, subject to certain restrictions, through home delivery. §§436.1111(5), 436.1203(2)–(4).

Under Michigan law, wine producers, as a general matter, must distribute their wine through wholesalers. There is, however, an exception for Michigan's approximately 40 in-state wineries, which are eligible for "wine maker" licenses that allow direct shipment to in-state consumers. §436.1113(9) (West 2001); §§436.1537(2)–(3) (West Supp. 2004); Mich. Admin. Code Rule 436.1011(7)(b) (2003). The cost of the license varies with the size of the winery. For a small winery, the license is $25. Mich. Comp. Laws Ann. §436.1525(1)(d) (West Supp. 2004). Out-of-state wineries can apply for a $300 "outside seller of wine" license, but this license only allows them to sell to in-state wholesalers. §§436.1109(9) (West 2001), 436.1525(1)(e) (West Supp. 2004); Mich. Admin. Code Rule 436.1719(5) (2000).

Some Michigan residents brought suit against various state officials in the United States District Court for the Eastern District of Michigan. Domaine Alfred, the San Luis Obispo winery, joined in the suit. The plaintiffs contended that Michigan's direct-shipment laws discriminated against interstate commerce in violation of the Commerce Clause. The trade association Michigan Beer & Wine Wholesalers intervened as a defendant. Both the State and the wholesalers argued that the ban on direct shipment from out-of-state wineries is a valid exercise of Michigan's power under §2 of the Twenty-first Amendment.

On cross-motions for summary judgment the District Court sustained the Michigan scheme. The Court of Appeals for the Sixth Circuit reversed. *Heald* v. *Engler*, 342 F. 3d 517 (2003). Relying on *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263 (1984), the court rejected the argument that the Twenty-first Amendment immunizes all state liquor laws from the strictures of the Commerce Clause, 342 F. 3d, at 524, and held the Michigan scheme was unconstitutional because the defendants failed to demonstrate the State could not meet its proffered policy objectives through nondiscriminatory means, *id.*, at 527.

B

New York's licensing scheme is somewhat different. It channels most wine sales through the three-tier system, but it too makes exceptions for in-state wineries. As in Michigan, the result is to allow local wineries to make direct sales to consumers in New York on terms not available to out-of-state wineries. Wineries that produce wine only from New York grapes can apply for a license that allows direct shipment to in-state consumers. N. Y. Alco. Bev. Cont. Law Ann. § 76–a(3) (West Supp. 2005) (hereinafter N. Y. ABC Law). These licensees are authorized to deliver the wines of other wineries as well, § 76–a(6)(a), but only if the wine is made from grapes "at least seventy-five percent the volume of which were grown in New York state," § 3(20–a). An out-of-state winery may ship directly to New York consumers only if it becomes a licensed New York winery, which requires the establishment of "a branch factory, office or storeroom within the state of New York." § 3(37).

Juanita Swedenburg and David Lucas, joined by three of their New York customers, brought suit in the Southern District of New York against the officials responsible for administering New York's Alcoholic Beverage Control Law seeking, *inter alia*, a declaration that the State's limitations on the direct shipment of out-of-state wine violate the Commerce Clause. New York liquor wholesalers and repre-

sentatives of New York liquor retailers intervened in support of the State.

The District Court granted summary judgment to the plaintiffs. 232 F. Supp. 2d 135 (2002). The court first determined that, under established Commerce Clause principles, the New York direct-shipment scheme discriminates against out-of-state wineries. *Id.*, at 146–147. The court then rejected the State's Twenty-first Amendment argument, finding that the "[d]efendants have not shown that New York's ban on the direct shipment of out-of-state wine, and particularly the in-state exceptions to the ban, implicate the State's core concerns under the Twenty-first Amendment." *Id.*, at 148.

The Court of Appeals for the Second Circuit reversed. 358 F. 3d 223 (2004). The court "recognize[d] that the physical presence requirement could create substantial dormant Commerce Clause problems if this licensing scheme regulated a commodity other than alcohol." *Id.*, at 238. The court nevertheless sustained the New York statutory scheme because, in the court's view, "New York's desire to ensure accountability through presence is aimed at the regulatory interests directly tied to the importation and transportation of alcohol for use in New York," *ibid.* As such, the New York direct-shipment laws were "within the ambit of the powers granted to states by the Twenty-first Amendment." *Id.*, at 239.

C

We consolidated these cases and granted certiorari on the following question: "'Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of § 2 of the Twenty-first Amendment?'" 541 U. S. 1062 (2004).

For ease of exposition, we refer to the respondents from the Michigan challenge (Nos. 03–1116 and 03–1120) and the petitioners in the New York challenge (No. 03–1274) collec-

tively as the wineries. We refer to their opposing parties—Michigan, New York, and the wholesalers and retailers—simply as the States.

## II

### A

Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc.* v. *Department of Environmental Quality of Ore.*, 511 U. S. 93, 99 (1994). See also *New Energy Co. of Ind.* v. *Limbach*, 486 U. S. 269, 274 (1988). This rule is essential to the foundations of the Union. The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States. *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 539 (1949). States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses. This mandate "reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes* v. *Oklahoma*, 441 U. S. 322, 325–326 (1979).

The rule prohibiting state discrimination against interstate commerce follows also from the principle that States should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens. States do not need, and may not attempt, to negotiate with other States regarding their mutual economic interests. Cf. U. S. Const., Art. I, § 10, cl. 3. Rivalries among the States are thus kept to a minimum, and a proliferation of trade zones is prevented. See *C & A Carbone, Inc.* v. *Clarkstown*,

511 U. S. 383, 390 (1994) (citing The Federalist No. 22, pp. 143–145 (C. Rossiter ed. 1961) (A. Hamilton); Madison, Vices of the Political System of the United States, in 2 Writings of James Madison 362–363 (G. Hunt ed. 1901)).

Laws of the type at issue in the instant cases contradict these principles. They deprive citizens of their right to have access to the markets of other States on equal terms. The perceived necessity for reciprocal sale privileges risks generating the trade rivalries and animosities, the alliances and exclusivity, that the Constitution and, in particular, the Commerce Clause were designed to avoid. State laws that protect local wineries have led to the enactment of statutes under which some States condition the right of out-of-state wineries to make direct wine sales to in-state consumers on a reciprocal right in the shipping State. California, for example, passed a reciprocity law in 1986, retreating from the State's previous regime that allowed unfettered direct shipments from out-of-state wineries. Riekhof & Sykuta, 27 Regulation, No. 3, at 30. Prior to 1986, all but three States prohibited direct shipments of wine. The obvious aim of the California statute was to open the interstate direct-shipping market for the State's many wineries. *Ibid.* The current patchwork of laws—with some States banning direct shipments altogether, others doing so only for out-of-state wines, and still others requiring reciprocity—is essentially the product of an ongoing, low-level trade war. Allowing States to discriminate against out-of-state wine "invite[s] a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 356 (1951). See also *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 521–523 (1935).

B

The discriminatory character of the Michigan system is obvious. Michigan allows in-state wineries to ship directly to consumers, subject only to a licensing requirement. Out-

of-state wineries, whether licensed or not, face a complete ban on direct shipment. The differential treatment requires all out-of-state wine, but not all in-state wine, to pass through an in-state wholesaler and retailer before reaching consumers. These two extra layers of overhead increase the cost of out-of-state wines to Michigan consumers. The cost differential, and in some cases the inability to secure a wholesaler for small shipments, can effectively bar small wineries from the Michigan market.

The New York regulatory scheme differs from Michigan's in that it does not ban direct shipments altogether. Out-of-state wineries are instead required to establish a distribution operation in New York in order to gain the privilege of direct shipment. N. Y. ABC Law §§3(37), 96 (West Supp. 2005). This, though, is just an indirect way of subjecting out-of-state wineries, but not local ones, to the three-tier system. New York and those allied with its interests defend the scheme by arguing that an out-of-state winery has the same access to the State's consumers as in-state wineries: All wine must be sold through a licensee fully accountable to New York; it just so happens that in order to become a licensee, a winery must have a physical presence in the State. There is some confusion over the precise steps out-of-state wineries must take to gain access to the New York market, in part because no winery has run the State's regulatory gauntlet. New York's argument, in any event, is unconvincing.

The New York scheme grants in-state wineries access to the State's consumers on preferential terms. The suggestion of a limited exception for direct shipment from out-of-state wineries does nothing to eliminate the discriminatory nature of New York's regulations. In-state producers, with the applicable licenses, can ship directly to consumers from their wineries. §§76–a(3), 76(4), and 77(2) (West 2000). Out-of-state wineries must open a branch office and warehouse in New York, additional steps that drive up the cost

of their wine. §§ 3(37), 96 (West Supp. 2005). See also App. in No. 03–1274, pp. 159–160 (Affidavit of Thomas G. McKeon, General Counsel to the New York State Liquor Authority). For most wineries, the expense of establishing a bricks-and-mortar distribution operation in 1 State, let alone all 50, is prohibitive. It comes as no surprise that not a single out-of-state winery has availed itself of New York's direct-shipping privilege. We have "viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 145 (1970). New York's in-state presence requirement runs contrary to our admonition that States cannot require an out-of-state firm "to become a resident in order to compete on equal terms." *Halliburton Oil Well Cementing Co.* v. *Reily*, 373 U. S. 64, 72 (1963). See also *Ward* v. *Maryland*, 12 Wall. 418 (1871).

In addition to its restrictive in-state presence requirement, New York discriminates against out-of-state wineries in other ways. Out-of-state wineries that establish the requisite branch office and warehouse in New York are still ineligible for a "farm winery" license, the license that provides the most direct means of shipping to New York consumers. N. Y. ABC Law § 76–a(5) (West Supp. 2005) ("No licensed farm winery shall manufacture or sell any wine not produced exclusively from grapes or other fruits or agricultural products grown or produced in New York state"). Out-of-state wineries may apply only for a commercial winery license. See §§ 3(37), 76. Unlike farm wineries, however, commercial wineries must obtain a separate certificate from the state liquor authority authorizing direct shipments to consumers, § 77(2) (West 2000); and, of course, for out-of-state wineries there is the additional requirement of maintaining a distribution operation in New York. New York law also allows in-state wineries without direct-shipping licenses to distribute their wine through other wineries that have the

applicable licenses. § 76(5) (West Supp. 2005). This is another privilege not afforded out-of-state wineries.

We have no difficulty concluding that New York, like Michigan, discriminates against interstate commerce through its direct-shipping laws.

III

State laws that discriminate against interstate commerce face "a virtually *per se* rule of invalidity." *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978). The Michigan and New York laws by their own terms violate this proscription. The two States, however, contend their statutes are saved by § 2 of the Twenty-first Amendment, which provides:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The States' position is inconsistent with our precedents and with the Twenty-first Amendment's history. Section 2 does not allow States to regulate the direct shipment of wine on terms that discriminate in favor of in-state producers.

A

Before 1919, the temperance movement fought to curb the sale of alcoholic beverages one State at a time. The movement made progress, and many States passed laws restricting or prohibiting the sale of alcohol. This Court upheld state laws banning the production and sale of alcoholic beverages, *Mugler* v. *Kansas*, 123 U. S. 623 (1887), but was less solicitous of laws aimed at imports. In a series of cases before ratification of the Eighteenth Amendment the Court, relying on the Commerce Clause, invalidated a number of state liquor regulations.

These cases advanced two distinct principles. First, the Court held that the Commerce Clause prevented States from discriminating against imported liquor. *Scott* v. *Donald*,

165 U. S. 58 (1897); *Walling* v. *Michigan*, 116 U. S. 446 (1886); *Tiernan* v. *Rinker*, 102 U. S. 123 (1880). In *Walling*, for example, the Court invalidated a Michigan tax that discriminated against liquor imports by exempting sales of local products. The Court held that States were not free to pass laws burdening only out-of-state products:

> "A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State, is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States." 116 U. S., at 455.

Second, the Court held that the Commerce Clause prevented States from passing facially neutral laws that placed an impermissible burden on interstate commerce. *Rhodes* v. *Iowa*, 170 U. S. 412 (1898); *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438 (1898); *Leisy* v. *Hardin*, 135 U. S. 100 (1890); *Bowman* v. *Chicago & Northwestern R. Co.*, 125 U. S. 465 (1888). For example, in *Bowman*, the Court struck down an Iowa statute that required all liquor importers to have a permit. *Bowman* and its progeny rested in part on the since-rejected original-package doctrine. Under this doctrine goods shipped in interstate commerce were immune from state regulation while in their original package. As the Court explained in *Vance:*

> "[T]he power to ship merchandise from one State into another carries with it, as an incident, the right in the receiver of the goods to sell them in the original packages, any state regulation to the contrary notwithstanding; that is to say, that the goods received by Interstate Commerce remain under the shelter of the Interstate Commerce clause of the Constitution, until by a sale in the original package they have been commingled with

> the general mass of property in the State." 170 U. S., at 444–445.

*Bowman* reserved the question whether a State could ban the sale of imported liquor altogether. 125 U. S., at 499–500. Iowa responded to *Bowman* by doing just that but was thwarted once again. In *Leisy, supra*, the Court held that Iowa could not ban the sale of imported liquor in its original package.

*Leisy* left the States in a bind. They could ban the production of domestic liquor, *Mugler, supra*, but these laws were ineffective because out-of-state liquor was immune from any state regulation as long as it remained in its original package, *Leisy, supra*. To resolve the matter, Congress passed the Wilson Act (so named for Senator Wilson of Iowa), which empowered the States to regulate imported liquor on the same terms as domestic liquor:

> "That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." Ch. 728, 26 Stat. 313 (codified at 27 U. S. C. § 121).

By its own terms, the Wilson Act did not allow States to discriminate against out-of-state liquor; rather, it allowed States to regulate imported liquor only "to the same extent and in the same manner" as domestic liquor.

The Court confirmed this interpretation in *Scott, supra*. *Scott* involved a constitutional challenge to South Carolina's dispensary law, 1895 S. C. Acts p. 721, which required that

all liquor sales be channeled through the state liquor commissioner. 165 U. S., at 92. The statute discriminated against out-of-state manufacturers in two primary ways. First, § 15 required the commissioner to "purchase his supplies from the brewers and distillers in this State when their product reaches the standard required by this Act: Provided, Such supplies can be purchased as cheaply from such brewers and distillers in this State as elsewhere." 1895 S. C. Acts p. 732. Second, § 23 of the statute limited the State's markup on locally produced wines to a 10-percent profit but provided "no such limitation of charge in the case of imported wines." 165 U. S., at 93. Based on these discriminatory provisions, the Court rejected the argument that the South Carolina dispensary law was authorized by the Wilson Act. *Id.*, at 100. It explained that the Wilson Act was "not intended to confer upon any State the power to discriminate injuriously against the products of other States in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce." *Ibid.* To the contrary, the Court said, the Wilson Act mandated "equality or uniformity of treatment under state laws," *ibid.*, and did not allow South Carolina to provide "an unjust preference" to its products "as against similar products of the other States," *id.*, at 101. The dissent also understood the validity of the dispensary law to turn in large part on §§ 15 and 23, but argued that even if these provisions were discriminatory the correct remedy was to sever them from the rest of the Act. *Id.*, at 104–106 (opinion of Brown, J.).

Although the Wilson Act increased the States' authority to police liquor imports, it did not solve all their problems. In *Vance* and *Rhodes*—two cases decided soon after *Scott*—the Court made clear that the Wilson Act did not authorize States to prohibit direct shipments for personal use. In *Vance*, the Court characterized *Scott* as embodying two distinct holdings: First, the South Carolina dispensary law "amount[ed] to an unjust discrimination against liquors, the

products of other States." 170 U. S., at 442. This aspect of the *Scott* holding, which confirmed the Wilson Act's nondiscrimination principle, was based "on particular provisions of the law by which the discrimination was brought about." 170 U. S., at 442. Second, "in so far as the law then in question forbade the sending . . . of intoxicating liquors for the use of the person to whom it was shipped, the statute was repugnant to [the Commerce Clause]." *Ibid.* (citing *Scott*, 165 U. S. 58). See also 170 U. S., at 443 (distinguishing between the provisions at issue in *Scott* "which were held to operate a discrimination" and those which barred direct shipment for personal use).

This second holding, that consumers had the right to receive alcoholic beverages shipped in interstate commerce for personal use, was only implicit in *Scott*. 165 U. S., at 78, 99–100. The Court expanded on this point, however, not only in *Vance* but again in *Rhodes*. *Rhodes* construed the Wilson Act narrowly to avoid interference with this right. The Act, the Court said, authorized States to regulate only the resale of imported liquor, not direct shipment to consumers for personal use. 170 U. S., at 421. Without a clear indication from Congress that it intended to allow States to ban such shipments, the *Rhodes* Court read the words "upon arrival" in the Wilson Act as authorizing "the power of the State to attach to an interstate commerce shipment," only after its arrival at the point of destination and delivery there to the consignee." *Id.*, at 426. See also *id.*, at 424; *Bridenbaugh* v. *Freeman-Wilson*, 227 F. 3d 848, 852 (CA7 2000). The Court interpreted the Wilson Act to overturn *Leisy* but leave *Bowman* intact. *Rhodes*, *supra*, at 423–424. The right to regulate did not attach until the liquor was in the hands of the customer. As a result, the mail-order liquor trade continued to thrive. Rogers, Interstate Commerce in Intoxicating Liquors Before the Webb-Kenyon Act, 4 Va. L. Rev. 353, 364–365 (1917).

After considering a series of bills in response to the Court's reading of the Wilson Act, Congress responded to the direct-shipment loophole in 1913 by enacting the Webb-Kenyon Act, 37 Stat. 699, 27 U. S. C. § 122. See Rogers, *supra*, at 363–370. The Act, entitled "An Act Divesting intoxicating liquors of their interstate character in certain cases," provides:

> "That the shipment or transportation . . . of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State . . . into any other State . . . which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . is hereby prohibited." 37 Stat., at 699–700.

The constitutionality of the Webb-Kenyon Act itself was in doubt. *Vance* and *Rhodes* implied that any law authorizing the States to regulate direct shipments for personal use would be an unlawful delegation of Congress' Commerce Clause powers. Indeed, President Taft, acting on the advice of Attorney General Wickersham, vetoed the Act for this specific reason. S. Rep. No. 103, 63d Cong., 1st Sess., 3–6 (1913); 30 Op. Atty. Gen. 88 (1913). Congress overrode the veto and in *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311 (1917), a divided Court upheld the Webb-Kenyon Act against a constitutional challenge.

The Court construed the Act to close the direct-shipment gap left open by the Wilson Act. States were now empowered to forbid shipments of alcohol to consumers for personal use, provided that the States treated in-state and out-of-state liquor on the same terms. *Id.*, at 321–322 (noting that the West Virginia law at issue in *Clark Distilling* "forbade the shipment into or transportation of liquor in the State whether from inside or out"). The Court understood that

the Webb-Kenyon Act "was enacted simply to extend that which was done by the Wilson Act." *Id.*, at 324. The Act's purpose "was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught." *Ibid.* The Court thus recognized that the Act was an attempt to eliminate the regulatory advantage, *i. e.*, its immunity characteristic, afforded imported liquor under *Bowman* and *Rhodes*.

Michigan and New York now argue the Webb-Kenyon Act went even further and removed any barrier to discriminatory state liquor regulations. We do not agree. First, this reading of the Webb-Kenyon Act conflicts with that given the statute in *Clark Distilling*. *Clark Distilling* recognized that the Webb-Kenyon Act extended the Wilson Act to allow the States to intercept liquor shipments before those shipments reached the consignee. The States' contention that the Webb-Kenyon Act also reversed the Wilson Act's prohibition on discriminatory treatment of out-of-state liquors cannot be reconciled with *Clark Distilling*'s description of the Webb-Kenyon Act's purpose—"simply to extend that which was done by the Wilson Act." 242 U. S., at 324. See also *McCormick & Co.* v. *Brown*, 286 U. S. 131, 140–141 (1932).

The statute's text does not compel a different result. The Webb-Kenyon Act readily can be construed as forbidding "shipment or transportation" only where it runs afoul of the State's generally applicable laws governing receipt, possession, sale, or use. Cf. *id.*, at 141 (noting that the Act authorized enforcement of "valid" state laws). At the very least, the Webb-Kenyon Act expresses no clear congressional intent to depart from the principle, unexceptional at the time the Act was passed and still applicable today, *Hillside Dairy Inc.* v. *Lyons*, 539 U. S. 59, 66 (2003), that discrimination against out-of-state goods is disfavored. Cf. *Western &*

*Southern Life Ins. Co.* v. *State Bd. of Equalization of Cal.*, 451 U. S. 648, 652–653 (1981) (holding that the McCarran-Ferguson Act, 15 U. S. C. § 1011 *et seq.*, removed all dormant Commerce Clause scrutiny of state insurance laws; § 1011 provides: "Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States").

Last, and most importantly, the Webb-Kenyon Act did not purport to repeal the Wilson Act, which expressly precludes States from discriminating. If Congress' aim in passing the Webb-Kenyon Act was to authorize States to discriminate against out-of-state goods then its first step would have been to repeal the Wilson Act. It did not do so. There is no inconsistency between the Wilson Act and the Webb-Kenyon Act sufficient to warrant an inference that the latter repealed the former. See *Washington* v. *Miller*, 235 U. S. 422, 428 (1914) (noting that implied repeals are disfavored). Indeed, this Court has twice noted that the Wilson Act remains in effect today. *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 333, n. 11 (1964); *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U. S. 341, 345, n. 7 (1964). See 27 U. S. C. § 121.

The Wilson Act reaffirmed, and the Webb-Kenyon Act did not displace, the Court's line of Commerce Clause cases striking down state laws that discriminated against liquor produced out of state. The rule of *Tiernan*, *Walling*, and *Scott* remained in effect: States were required to regulate domestic and imported liquor on equal terms. "[T]he intent of . . . the Webb-Kenyon Act . . . was to take from intoxicating liquor the protection of the interstate commerce laws in so far as necessary to deny them an advantage over the intoxicating liquors produced in the state into which they were brought, yet, [the Act does not] show an intent or purpose to

so abdicate control over interstate commerce as to permit discrimination against the intoxicating liquor brought into one state from another." *Pacific Fruit & Produce Co.* v. *Martin*, 16 F. Supp. 34, 39–40 (WD Wash. 1936). See also Friedman, Constitutional Law: State Regulation of Importation of Intoxicating Liquor Under Twenty-first Amendment, 21 Cornell L. Q. 504, 509 (1936) ("The cases under the Webb-Kenyon Act uphold state prohibition and regulation in the exercise of the police power yet they clearly forbid laws which discriminate arbitrarily and unreasonably against liquor produced outside of the state" (footnote omitted)).

B

The ratification of the Eighteenth Amendment in 1919 provided a brief respite from the legal battles over the validity of state liquor regulations. With the ratification of the Twenty-first Amendment 14 years later, however, nationwide Prohibition came to an end. Section 1 of the Twenty-first Amendment repealed the Eighteenth Amendment. Section 2 of the Twenty-first Amendment is at issue here.

Michigan and New York say the provision grants to the States the authority to discriminate against out-of-state goods. The history we have recited does not support this position. To the contrary, it provides strong support for the view that §2 restored to the States the powers they had under the Wilson and Webb-Kenyon Acts. "The wording of §2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes." *Craig* v. *Boren*, 429 U. S. 190, 205–206 (1976) (footnote omitted).

The aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against

out-of-state goods, a privilege they had not enjoyed at any earlier time.

Some of the cases decided soon after ratification of the Twenty-first Amendment did not take account of this history and were inconsistent with this view. In *State Bd. of Equalization of Cal.* v. *Young's Market Co.*, 299 U. S. 59, 62 (1936), for example, the Court rejected the argument that the Amendment did not authorize discrimination:

> "The plaintiffs ask us to limit this broad command [of §2]. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it."

The Court reaffirmed the States' broad powers under §2 in a series of cases, see *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401 (1938); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U. S. 391 (1939); *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132 (1939); *Joseph S. Finch & Co.* v. *McKittrick*, 305 U. S. 395 (1939), and unsurprisingly many States used the authority bestowed on them by the Court to expand trade barriers. T. Green, Liquor Trade Barriers: Obstructions to Interstate Commerce in Wine, Beer, and Distilled Spirits 4, and App. I (1940) (stating in the wake of *Young's Market* that "[r]ivalries and reprisals have thus flared up").

It is unclear whether the broad language in *Young's Market* was necessary to the result because the Court also stated that "the case [did] not present a question of discrimination prohibited by the commerce clause." 299 U. S., at 62. The Court also declined, contrary to the approach we take today, to consider the history underlying the Twenty-first Amendment. *Id.*, at 63–64. This reluctance did not, however, re-

flect a consensus that such evidence was irrelevant or that prior history was unsupportive of the principle that the Amendment did not authorize discrimination against out-of-state liquors. There was ample opinion to the contrary. See, *e. g., Young's Market Co.* v. *State Bd. of Equalization of Cal.*, 12 F. Supp. 140 (SD Cal. 1935) *(per curiam)*, rev'd, 299 U. S. 59 (1936); *Pacific Fruit & Produce Co.* v. *Martin*, *supra*, at 39; *Joseph Triner Corp.* v. *Arundel*, 11 F. Supp. 145, 146–147 (Minn. 1935); Friedman, *supra*, at 511–512; Note, Recent Cases, Twenty-first Amendment—Commerce Clause, 85 U. Pa. L. Rev. 322, 323 (1937); W. Hamilton, Price and Price Policies 426 (1938); Note, Legislation, Liquor Control, 38 Colum. L. Rev. 644, 658 (1938); Wiser & Arledge, Does the Repeal Amendment Empower a State to Erect Tariff Barriers and Disregard the Equal Protection Clause in Legislating on Intoxicating Liquors in Interstate Commerce? 7 Geo. Wash. L. Rev. 402, 407–409 (1939); De Ganahl, The Scope of Federal Power Over Alcoholic Beverages Since the Twenty-first Amendment, 8 Geo. Wash. L. Rev. 819, 822–828 (1940); Note, 55 Yale L. J. 815, 819–820 (1946).

Our more recent cases, furthermore, confirm that the Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference to their own producers.

C

The modern §2 cases fall into three categories.

First, the Court has held that state laws that violate other provisions of the Constitution are not saved by the Twenty-first Amendment. The Court has applied this rule in the context of the First Amendment, *44 Liquormart, Inc.* v. *Rhode Island*, 517 U. S. 484 (1996); the Establishment Clause, *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116 (1982); the Equal Protection Clause, *Craig*, *supra*, at 204–209; the Due Process Clause, *Wisconsin* v. *Constantineau*, 400 U. S.

433 (1971); and the Import-Export Clause, *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U. S. 341 (1964).

Second, the Court has held that §2 does not abrogate Congress' Commerce Clause powers with regard to liquor. *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691 (1984); *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U. S. 97 (1980). The argument that "the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause" for alcoholic beverages has been rejected. *Hostetter*, 377 U. S., at 331–332. Though the Court's language in *Hostetter* may have come uncommonly close to hyperbole in describing this argument as "an absurd oversimplification," "patently bizarre," and "demonstrably incorrect," *ibid.*, the basic point was sound.

Finally, and most relevant to the issue at hand, the Court has held that state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause. *Bacchus*, 468 U. S., at 276; *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. 573 (1986); *Healy* v. *Beer Institute*, 491 U. S. 324 (1989). "When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry." *Brown-Forman*, *supra*, at 579.

*Bacchus* provides a particularly telling example of this proposition. At issue was an excise tax enacted by Hawaii that exempted certain alcoholic beverages produced in that State. The Court rejected the argument that Hawaii's discrimination against out-of-state liquor was authorized by the Twenty-first Amendment. 468 U. S., at 274–276. "The central purpose of the [Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." *Id.*, at 276. Despite attempts to distinguish it in the instant cases, *Bacchus* forecloses any contention that §2

of the Twenty-first Amendment immunizes discriminatory direct-shipment laws from Commerce Clause scrutiny. See also *Brown-Forman*, *supra*, at 576 (invalidating a New York price affirmation statute that required producers to limit the price of liquor based on the lowest price they offered out of state); *Healy*, 491 U. S., at 328 (invalidating a similar Connecticut statute); *id.*, at 344 (SCALIA, J., concurring in part and concurring in judgment) ("The Connecticut statute's invalidity is fully established by its facial discrimination against interstate commerce .... This is so despite the fact that the law regulates the sale of alcoholic beverages, since its discriminatory character eliminates the immunity afforded by the Twenty-first Amendment").

Recognizing that *Bacchus* is fatal to their position, the States suggest it should be overruled or limited to its facts. As the foregoing analysis makes clear, we decline their invitation. Furthermore, *Bacchus* does not stand alone in recognizing that the Twenty-first Amendment did not give the States complete freedom to regulate where other constitutional principles are at stake. A retreat from *Bacchus* would also undermine *Brown-Forman* and *Healy*. These cases invalidated state liquor regulations under the Commerce Clause. Indeed, *Healy* explicitly relied on the discriminatory character of the Connecticut price affirmation statute. 491 U. S., at 340–341. *Brown-Forman* and *Healy* lend significant support to the conclusion that the Twenty-first Amendment does not immunize all laws from Commerce Clause challenge.

The States argue that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system. This does not follow from our holding. "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Midcal*, *supra*, at 110. A State which chooses to ban the sale and consumption of alcohol

altogether could bar its importation; and, as our history shows, it would have to do so to make its laws effective. States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system. We have previously recognized that the three-tier system itself is "unquestionably legitimate." *North Dakota* v. *United States*, 495 U. S., at 432. See also *id.*, at 447 (SCALIA, J., concurring in judgment) ("The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler"). State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent. The instant cases, in contrast, involve straightforward attempts to discriminate in favor of local producers. The discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment.

## IV

Our determination that the Michigan and New York direct-shipment laws are not authorized by the Twenty-first Amendment does not end the inquiry. We still must consider whether either state regime "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind.*, 486 U. S., at 278. The States offer two primary justifications for restricting direct shipments from out-of-state wineries: keeping alcohol out of the hands of minors and facilitating tax collection. We consider each in turn.

The States, aided by several *amici*, claim that allowing direct shipment from out-of-state wineries undermines their ability to police underage drinking. Minors, the States argue, have easy access to credit cards and the Internet and are likely to take advantage of direct wine shipments as a means of obtaining alcohol illegally.

The States provide little evidence that the purchase of wine over the Internet by minors is a problem. Indeed, there is some evidence to the contrary. A recent study by the staff of the FTC found that the 26 States currently allowing direct shipments report no problems with minors' increased access to wine. FTC Report 34. This is not surprising for several reasons. First, minors are less likely to consume wine, as opposed to beer, wine coolers, and hard liquor. *Id.*, at 12. Second, minors who decide to disobey the law have more direct means of doing so. Third, direct shipping is an imperfect avenue of obtaining alcohol for minors who, in the words of the past president of the National Conference of State Liquor Administrators, "'want instant gratification.'" *Id.*, at 33, and n. 137 (explaining why minors rarely buy alcohol via the mail or the Internet). Without concrete evidence that direct shipping of wine is likely to increase alcohol consumption by minors, we are left with the States' unsupported assertions. Under our precedents, which require the "clearest showing" to justify discriminatory state regulation, *C & A Carbone, Inc.*, 511 U. S., at 393, this is not enough.

Even were we to credit the States' largely unsupported claim that direct shipping of wine increases the risk of underage drinking, this would not justify regulations limiting only out-of-state direct shipments. As the wineries point out, minors are just as likely to order wine from in-state producers as from out-of-state ones. Michigan, for example, already allows its licensed retailers (over 7,000 of them) to deliver alcohol directly to consumers. Michigan counters that it has greater regulatory control over in-state producers than over out-of-state wineries. This does not justify Michigan's discriminatory ban on direct shipping. Out-of-state wineries face the loss of state and federal licenses if they fail to comply with state law. This provides strong incentives not to sell alcohol to minors. In addition, the States can take less restrictive steps to minimize the risk that minors

will order wine by mail. For example, the Model Direct Shipping Bill developed by the National Conference of State Legislatures requires an adult signature on delivery and a label so instructing on each package.

The States' tax-collection justification is also insufficient. Increased direct shipping, whether originating in state or out of state, brings with it the potential for tax evasion. With regard to Michigan, however, the tax-collection argument is a diversion. That is because Michigan, unlike many other States, does not rely on wholesalers to collect taxes on wines imported from out of state. Instead, Michigan collects taxes directly from out-of-state wineries on all wine shipped to in-state wholesalers. Mich. Admin. Code Rule 436.1725(2) (1989) ("Each outside seller of wine shall submit . . . a wine tax report of all wine sold, delivered, or imported into this state during the preceding calendar month"). If licensing and self-reporting provide adequate safeguards for wine distributed through the three-tier system, there is no reason to believe they will not suffice for direct shipments.

New York and its supporting parties also advance a tax-collection justification for the State's direct-shipment laws. While their concerns are not wholly illusory, their regulatory objectives can be achieved without discriminating against interstate commerce. In particular, New York could protect itself against lost tax revenue by requiring a permit as a condition of direct shipping. This is the approach taken by New York for in-state wineries. The State offers no reason to believe the system would prove ineffective for out-of-state wineries. Licensees could be required to submit regular sales reports and to remit taxes. Indeed, various States use this approach for taxing direct interstate wine shipments, *e. g.*, N. H. Rev. Stat. Ann. § 178.27 (Lexis Supp. 2004), and report no problems with tax collection. See FTC Report 38–40. This is also the procedure sanctioned by the National Conference of State Legislatures in their Model Direct

Shipping Bill. See, *e. g.*, S. C. Code Ann. §61–4–747(C) (West Supp. 2004).

Michigan and New York benefit, furthermore, from provisions of federal law that supply incentives for wineries to comply with state regulations. The Tax and Trade Bureau (formerly the Bureau of Alcohol, Tobacco and Firearms) has authority to revoke a winery's federal license if it violates state law. BATF Industry Circular 96–3 (1997). Without a federal license, a winery cannot operate in any State. See 27 U. S. C. §204. In addition the Twenty-first Amendment Enforcement Act gives state attorneys general the power to sue wineries in federal court to enjoin violations of state law. §122a(b).

These federal remedies, when combined with state licensing regimes, adequately protect States from lost tax revenue. The States have not shown that tax evasion from out-of-state wineries poses such a unique threat that it justifies their discriminatory regimes.

Michigan and New York offer a handful of other rationales, such as facilitating orderly market conditions, protecting public health and safety, and ensuring regulatory accountability. These objectives can also be achieved through the alternative of an evenhanded licensing requirement. FTC Report 40–41. Finally, it should be noted that improvements in technology have eased the burden of monitoring out-of-state wineries. Background checks can be done electronically. Financial records and sales data can be mailed, faxed, or submitted via e-mail.

In summary, the States provide little concrete evidence for the sweeping assertion that they cannot police direct shipments by out-of-state wineries. Our Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods. The "burden is on the State to show that 'the *discrimination* is demonstrably justified,'" *Chemical Waste Management, Inc.* v. *Hunt*, 504 U. S. 334, 344 (1992) (emphasis in original). The Court has

upheld state regulations that discriminate against interstate commerce only after finding, based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable. See, *e. g.*, *Maine* v. *Taylor*, 477 U. S. 131, 141–144 (1986). Michigan and New York have not satisfied this exacting standard.

V

States have broad power to regulate liquor under §2 of the Twenty-first Amendment. This power, however, does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers. If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms. Without demonstrating the need for discrimination, New York and Michigan have enacted regulations that disadvantage out-of-state wine producers. Under our Commerce Clause jurisprudence, these regulations cannot stand.

We affirm the judgment of the Court of Appeals for the Sixth Circuit; and we reverse the judgment of the Court of Appeals for the Second Circuit and remand the case for further proceedings consistent with our opinion.

*It is so ordered.*

JUSTICE STEVENS, with whom JUSTICE O'CONNOR joins, dissenting.

Congress' power to regulate commerce among the States includes the power to authorize the States to place burdens on interstate commerce. *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408 (1946). Absent such congressional approval, a state law may violate the unwritten rules described as the "dormant Commerce Clause" either by imposing an undue burden on both out-of-state and local producers engaged in interstate activities or by treating out-of-state producers less favorably than their local competitors. See, *e. g.*, *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137 (1970); *Philadelphia* v.

*New Jersey*, 437 U. S. 617 (1978). A state law totally prohibiting the sale of an ordinary article of commerce might impose an even more serious burden on interstate commerce. If Congress may nevertheless authorize the States to enact such laws, surely the people may do so through the process of amending our Constitution.

The New York and Michigan laws challenged in these cases would be patently invalid under well-settled dormant Commerce Clause principles if they regulated sales of an ordinary article of commerce rather than wine. But ever since the adoption of the Eighteenth Amendment and the Twenty-first Amendment, our Constitution has placed commerce in alcoholic beverages in a special category. Section 2 of the Twenty-first Amendment expressly provides that "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Today many Americans, particularly those members of the younger generations who make policy decisions, regard alcohol as an ordinary article of commerce, subject to substantially the same market and legal controls as other consumer products. That was definitely not the view of the generations that made policy in 1919 when the Eighteenth Amendment was ratified or in 1933 when it was repealed by the Twenty-first Amendment.[1] On the contrary, the moral condemnation of the use of alcohol as a beverage represented

[1] In the words of Justice Jackson: "The people of the United States knew that liquor is a lawlessness unto itself. They determined that it should be governed by a specific and particular Constitutional provision. They did not leave it to the courts to devise special distortions of the general rules as to interstate commerce to curb liquor's 'tendency to get out of legal bounds.' It was their unsatisfactory experience with that method that resulted in giving liquor an exclusive place in constitutional law as a commodity whose transportation is governed by a special, constitutional provision." *Duckworth* v. *Arkansas*, 314 U. S. 390, 398–399 (1941) (opinion concurring in result).

not merely the convictions of our religious leaders, but the views of a sufficiently large majority of the population to warrant the rare exercise of the power to amend the Constitution on two occasions. The Eighteenth Amendment entirely prohibited commerce in "intoxicating liquors" for beverage purposes throughout the United States and the territories subject to its jurisdiction. While §1 of the Twenty-first Amendment repealed the nationwide prohibition, §2 gave the States the option to maintain equally comprehensive prohibitions in their respective jurisdictions.

The views of judges who lived through the debates that led to the ratification of those Amendments are entitled to special deference. Foremost among them was Justice Brandeis, whose understanding of a State's right to discriminate in its regulation of out-of-state alcohol could not have been clearer:

> "The plaintiffs ask us to limit [§2's] broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it. . . . Can it be doubted that a State might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee?" *State Bd. of Equalization of Cal.* v. *Young's Market Co.*, 299 U. S. 59, 62–63 (1936).[2]

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[2] According to Justice Black, who participated in the passage of the Twenty-first Amendment in the Senate, §2 was intended to return "'absolute control' of liquor traffic to the States, free of all restrictions which the Commerce Clause might before that time have imposed." *Hostetter*

In the years following the ratification of the Twenty-first Amendment, States adopted manifold laws regulating commerce in alcohol, and many of these laws were discriminatory.[3] So-called "dry states" entirely prohibited such commerce; others prohibited the sale of alcohol on Sundays; others permitted the sale of beer and wine but not hard liquor; most created either state monopolies or distribution systems that gave discriminatory preferences to local retailers and distributors. The notion that discriminatory state laws violated the unwritten prohibition against balkanizing the American economy—while persuasive in contemporary times when alcohol is viewed as an ordinary article of commerce—would have seemed strange indeed to the millions of Americans who condemned the use of the "demon rum" in the 1920's and 1930's. Indeed, they expressly authorized the "balkanization" that today's decision condemns. Today's decision may represent sound economic policy and may be consistent with the policy choices of the contemporaries of Adam Smith who drafted our original Constitution;[4] it is not, however, consistent with the policy choices made by those who amended our Constitution in 1919 and 1933.

My understanding (and recollection) of the historical context reinforces my conviction that the text of §2 should be "broadly and colloquially interpreted." *Carter* v. *Virginia*, 321 U. S. 131, 141 (1944) (Frankfurter, J., concurring).[5] In-

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v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 338 (1964) (dissenting opinion).

[3] See generally Green, Interstate Barriers in the Alcoholic Beverage Field, 7 Law & Contemp. Prob. 717 (1940); *post*, at 517–520 (THOMAS, J., dissenting).

[4] Cf. *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 169 (1920) (Holmes, J., dissenting) ("I cannot for a moment believe that apart from the Eighteenth Amendment special constitutional principles exist against strong drink. The fathers of the Constitution so far as I know approved it").

[5] As he added in that case, "since Virginia derives the power to legislate as she did from the Twenty-first Amendment, the Commerce Clause does not come into play." *Carter* v. *Virginia*, 321 U. S., at 143.

deed, the fact that the Twenty-first Amendment was the only Amendment in our history to have been ratified by the people in state conventions, rather than by state legislatures, provides further reason to give its terms their ordinary meaning. Because the New York and Michigan laws regulate the "transportation or importation" of "intoxicating liquors" for "delivery or use therein," they are exempt from dormant Commerce Clause scrutiny.

As JUSTICE THOMAS has demonstrated, the text of the Twenty-first Amendment is a far more reliable guide to its meaning than the unwritten rules that the majority enforces today. I therefore join his persuasive and comprehensive dissenting opinion.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE, JUSTICE STEVENS, and JUSTICE O'CONNOR join, dissenting.

A century ago, this Court repeatedly invalidated, as inconsistent with the negative Commerce Clause, state liquor legislation that prevented out-of-state businesses from shipping liquor directly to a State's residents. The Webb-Kenyon Act and the Twenty-first Amendment cut off this intrusive review, as their text and history make clear and as this Court's early cases on the Twenty-first Amendment recognized. The Court today seizes back this power, based primarily on a historical argument that this Court decisively rejected long ago in *State Bd. of Equalization of Cal.* v. *Young's Market Co.*, 299 U. S. 59, 64 (1936). Because I would follow *Young's Market* and the language of both the statute that Congress enacted and the Amendment that the Nation ratified, rather than the Court's questionable reading of history and the "negative implications" of the Commerce Clause, I respectfully dissent.

I

The Court devotes much attention to the Twenty-first Amendment, yet little to the terms of the Webb-Kenyon Act. This is a mistake, because that Act's language displaces any

negative Commerce Clause barrier to state regulation of liquor sales to in-state consumers.

## A

The Webb-Kenyon Act immunizes from negative Commerce Clause review the state liquor laws that the Court holds are unconstitutional. The Act "prohibit[s]" any "shipment or transportation" of alcoholic beverages "into any State" when those beverages are "intended, by any person interested therein, to be received, possessed, sold, or in any manner used . . . in violation of any law of such State."[1] State laws that regulate liquor imports in the manner described by the Act are exempt from judicial scrutiny under the negative Commerce Clause, as this Court has long held. See *McCormick & Co.* v. *Brown*, 286 U. S. 131, 139–140 (1932); *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311, 324 (1917); *Seaboard Air Line R. Co.* v. *North Carolina*, 245 U. S. 298, 303–304 (1917). The Webb-Kenyon Act's language, in other words, "prevent[s] the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws." *Clark Distilling*, *supra*, at 324.

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[1] The Webb-Kenyon Act provides:

"The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is prohibited." 27 U. S. C. § 122.

The Michigan and New York direct-shipment laws are within the Webb-Kenyon Act's terms and therefore do not run afoul of the negative Commerce Clause. Those laws restrict out-of-state wineries from shipping and selling wine directly to Michigan and New York consumers. *Ante*, at 469, 470. Any winery that ships wine directly to a Michigan or New York consumer in violation of those state-law restrictions is a "person interested therein" "intend[ing]" to "s[ell]" wine "in violation of" Michigan and New York law, and thus comes within the terms of the Webb-Kenyon Act.

This construction of the Webb-Kenyon Act is no innovation. The Court adopted this reading of the Act in *McCormick & Co.* v. *Brown*, *supra*, and Congress approved it shortly thereafter in 1935 when it reenacted the Act without alteration, 49 Stat. 877; see, *e. g.*, *Keene Corp.* v. *United States*, 508 U. S. 200, 212–213 (1993) (applying presumption that reenacted statute incorporates settled judicial construction). *McCormick* considered a state law that prohibited out-of-state manufacturers (as well as in-state manufacturers) from shipping liquor to a licensed in-state dealer without first obtaining a wholesaler permit. The Court held that by shipping liquor into the State without a license, the out-of-state manufacturer "[fell] directly within the terms of" the Webb-Kenyon Act, thus violating it. 286 U. S., at 143; see also *Rainier Brewing Co.* v. *Great Northern Pacific S. S. Co.*, 259 U. S. 150, 152–153 (1922) (holding that under the Webb-Kenyon Act, beer importers must "carry" beer into the State "in the manner allowed by the laws of that State"). While the law at issue in *McCormick* did not discriminate against out-of-state products, the construction of the Webb-Kenyon Act it adopted applies equally to state laws that so discriminate. If an out-of-state manufacturer shipping liquor to an in-state distributor without a license "s[ells]" liquor "in violation of any law of such State" within the meaning of Webb-Kenyon, as *McCormick* held, an out-of-state winery directly shipping wine to consumers in violation of even a discrimina-

tory state law does so as well. The Michigan and New York laws are indistinguishable in relevant part from the state law upheld in *McCormick*.[2]

The Court answers that the Webb-Kenyon Act's text "readily can be construed as forbidding 'shipment or transportation' only where it runs afoul of the States' generally applicable laws governing receipt, possession, sale, or use." *Ante*, at 482. What the Court means by "generally applicable" laws is unclear, for the Court concedes that the Webb-Kenyon Act allows States to pass laws discriminating against out-of-state wholesalers. See *ante*, at 484, 488–489. By "generally applicable [state] laws," therefore, the Court apparently means all state laws except for those that "discriminate" against out-of-state liquor products. See *ante*, at 482–484, 488–489.

The Court leaves unexplained how this ad hoc exception follows from the Act's text. The Act's language leaves no room for this exception. The Act does not condition a State's ability to regulate the receipt, possession, and use of liquor free from negative Commerce Clause immunity on the character of the state law. It does not mention "discrimination," much less discrimination against out-of-state liquor products. Instead, it prohibits the interstate shipment of liquor into a State "in violation of any law of such State." 27 U. S. C. § 122. "[A]ny law of such State" means any law, including a "discriminatory" one.

The Court's distinction between discrimination against manufacturers and discrimination against wholesalers is

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[2] The Court notes that *McCormick* held that the Webb-Kenyon Act only authorized "valid" laws, the suggestion being that *McCormick*'s holding applies only to nondiscriminatory (and hence "valid" laws). *Ante*, at 482. The Court takes this word out of context. By "valid" laws, *McCormick* meant laws not pre-empted by the National Prohibition Act, rather than laws that treated in-state and out-of-state products equally. See 286 U. S., at 143–144 (finding the legislation "valid" because the National Prohibition Act did not pre-empt it).

equally unjustified. There is no warrant in the Act's text for treating regulated entities differently depending on their place in the distribution chain: The Act applies in undifferentiated fashion to "any person interested therein." A wine manufacturer shipping wine directly to a consumer is an interested party, just as an out-of-state liquor wholesaler is.[3]

The contrast between the language of the Webb-Kenyon Act and its predecessor, the Wilson Act, casts still more doubt on the Court's reading. The Wilson Act provided that liquor shipped into a State was "subject to the operation and effect of the laws of such State . . . to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory." § 121. Even if this language does not authorize States to discriminate against out-of-state liquor products, see *ante*, at 478, the Webb-Kenyon Act has no comparable language addressing discrimination. The contrast is telling. It shows that the Webb-Kenyon Act encompasses laws that discriminate against both out-of-state wholesalers and out-of-state manufacturers.

In support of its conclusion that the Webb-Kenyon Act did not authorize States to discriminate, the Court relies heavily on *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311 (1917). *Ante*, at 481–482. Its reliance is misplaced. *Clark Distilling* held that the Webb-Kenyon Act authorized a nondiscriminatory state law, 242 U. S., at 321–322, and so had no direct occasion to pass on whether the Act also authorized discriminatory laws. Nothing in it implicitly

[3] The Court also states that the "Webb-Kenyon Act expresses no clear congressional intent to depart from the principle . . . that discrimination against out-of-state goods is disfavored." *Ante*, at 482. That is not correct. It is settled that the Webb-Kenyon Act explicitly abrogates negative Commerce Clause review of state laws that fall within its terms. See *supra*, at 498–499. There is no reason to require another clear statement for each sort of law to which it might apply. The only question is whether, fairly read, the Webb-Kenyon Act covers Michigan's and New York's direct-shipment laws. As I have explained, it does.

decided that unsettled question in the manner the Court suggests.

To the extent that it is relevant, *Clark Distilling* supports the view that the Webb-Kenyon Act authorized States to discriminate. Contrary to the Court's suggestion, *Clark Distilling* did not say (on pages 321, 322, or elsewhere) that the Webb-Kenyon Act "empowered [States] to forbid shipments of alcohol to consumers for personal use, provided that [they] treated in-state and out-of-state liquor on the same terms." *Ante*, at 481. Instead, *Clark Distilling* construed the Webb-Kenyon Act to "extend that which was done by the Wilson Act" in that its "purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws." 242 U. S., at 324. The Court takes this passage only to refer to "nondiscriminatory" state laws, *ante*, at 481, but this is not correct. The passage the Court cites implies that the Webb-Kenyon Act also abrogated the nondiscrimination principle of the negative Commerce Clause, since that principle flows from the "immunity characteristic of interstate commerce," no less than any other negative Commerce Clause doctrine. In other words, *Clark Distilling* recognized that the Webb-Kenyon Act took "the protection of interstate commerce away from *all receipt and possession of liquor prohibited by state law.*" 242 U. S., at 325 (emphasis added). *Clark Distilling* thus confirms what the text of the Webb-Kenyon Act makes clear: The Webb-Kenyon Act "extended" the Wilson Act by completely immunizing all state laws regulating liquor imports from negative Commerce Clause restraints.[4]

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[4] The Court also opines that, quite apart from the Webb-Kenyon Act, the Wilson Act "expressly precludes States from discriminating." *Ante*, at 483. It does not. The Wilson Act "precludes" States from nothing. Instead, it authorizes them to regulate liquor free of negative Commerce Clause restraints by "subject[ing]" imported liquor "to the operation" of state law, taking state law as it finds it. 27 U. S. C. § 121. Even if, as

B

Straying from the Webb-Kenyon Act's text, the Court speculates that Congress intended the Act merely to overrule a discrete line of this Court's negative Commerce Clause cases invalidating "nondiscriminatory" state liquor regulation laws, including *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438 (1898), and *Rhodes* v. *Iowa*, 170 U. S. 412 (1898). *Ante*, at 478–484. According to the majority, *ante*, at 483–484, the Webb-Kenyon Act left untouched this Court's cases preventing States from regulating liquor in "discriminatory" fashion. See, *e. g.*, *Scott* v. *Donald*, 165 U. S. 58 (1897) *(Scott)*; *Walling* v. *Michigan*, 116 U. S. 446 (1886); and *Tiernan* v. *Rinker*, 102 U. S. 123 (1880). The plain language of the Webb-Kenyon Act makes the Court's guesswork about Congress' intent unnecessary. But even taken on its own terms, the majority's historical argument is unpersuasive. History reveals that the Webb-Kenyon Act overturned not only *Vance* and *Rhodes*, but also *Scott* and therefore its "nondiscrimination" principle.

The origins of the Webb-Kenyon Act are in this Court's decision in *Leisy* v. *Hardin*, 135 U. S. 100 (1890). *Leisy* held that States were prohibited from regulating the resale of alcohol imported from outside the State so long as the liquor stayed in its "original packag[e]." *Id.*, at 124–125. This rule made it more difficult for States to prohibit the in-state consumption of liquor. Even if a State banned the domestic production of liquor altogether, *Leisy* left it powerless to stop the flow of liquor from outside its borders.

Congress reacted swiftly by enacting the Wilson Act in August 1890. The Wilson Act authorized States to regulate liquor "upon arrival in such State" whether "in original pack-

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the Court suggests, the Wilson Act does not authorize States to discriminate, *ante*, at 478, the Webb-Kenyon Act extends that authorization to cover discriminatory state laws. The only question here is the scope of the broader, more inclusive Webb-Kenyon Act. The Court's argument therefore adds nothing to the analysis.

ages or otherwise," 27 U. S. C. § 121, and therefore subjected imports to state jurisdiction "upon arrival within the jurisdiction of the State." *Rhodes, supra,* at 433 (Gray, J., dissenting). The Wilson Act accordingly abrogated *Leisy* and similar decisions by subjecting liquor imports to the operation of state law once the liquor came within a State's geographic borders.

Rather than holding that the Wilson Act meant what it said, three decisions of this Court construed the Act to be a virtual nullity. The first was *Scott, supra.* South Carolina had decided to regulate traffic in liquor by monopolizing the sale and distribution of liquor. All liquor, whether produced in or out of the State, could be sold to consumers in the State only by the state commissioner of alcohol. *Id.,* at 66–68, n. 1, 92. The law thus prohibited out-of-state manufacturers and wholesalers, as well as their in-state counterparts, from shipping liquor directly to consumers.

The appellee, Donald, was a citizen of South Carolina who had ordered liquor directly from out-of-state shippers for his own personal use, rather than through the state monopoly system as South Carolina law required. *Id.,* at 59; see also *Scott* v. *Donald,* 165 U. S. 107, 108–109 (1897) *(Donald).* South Carolina officials seized the liquor he ordered after it had crossed South Carolina lines, but before he had received it. Donald sued the officials for damages, as well as an injunction allowing him to import liquor directly from out-of-state shippers for his own personal use. *Scott, supra,* at 69–70; *Donald, supra,* at 109–110.

The Court held that South Carolina's ban on the direct shipment of liquor unconstitutionally interfered with the right of out-of-state entities to ship liquor directly to consumers for their personal use, entitling Donald to damages and injunctive relief. *Scott, supra,* at 78, 99–100; *Donald, supra,* at 114; see also *Vance, supra,* at 452 (describing the "ruling" of *Scott* to be that a State could not "forbid the

shipment into the State from other States of intoxicating liquors for the use of a resident"). The Court reasoned that the ban on importation, "in effect, discriminate[d] between interstate and domestic commerce in commodities to make and use which are admitted to be lawful." *Scott*, 165 U. S., at 100. The Court reserved the question whether a state monopoly system that allowed consumers to import liquor directly was constitutional; for the Court, it "suffic[ed]" that South Carolina's ban on imports "discriminate[d] against the bringing of such articles in, and importing them from other States." *Id.*, at 101. The Court's excuse for holding that the Wilson Act did not save the State's ban on importation was the same as the Court's excuse today: that the Wilson Act did not authorize "discriminatory" state legislation. *Ibid.* On this basis, the Court affirmed Donald's damages award. *Ibid.*

In response to *Scott*, Senator Tillman of South Carolina quickly introduced the first version of what became the Webb-Kenyon Act. His bill explicitly attempted to reverse the *Scott* decision. The Senate Report on the bill noted that "[t]he effect of [*Scott* was] to throw down all the barriers erected by the State law, in which she is protected by the Wilson bill, and allow the untrammeled importation of liquor into the State upon the simple claim that it is for private use." S. Rep. No. 151, 55th Cong., 1st Sess., 5 (1897). The Report also addressed *Scott*'s holding that South Carolina's ban on importation was "discriminatory" and adopted the *Scott* dissenter's view that the ban on importation effected "no discrimination against citizens of other States." S. Rep. No. 151, at 5. The bill accordingly would have amended the Wilson Act to grant States "'absolute control of . . . liquors or liquids within their borders, by whomsoever produced and for whatever use imported.'" 30 Cong. Rec. 2612 (1897). The bill passed in the Senate without debate. It failed in the House, perhaps because the House Judiciary Committee

added an amendment that barred discrimination against the products of other States, leaving *Scott* intact. H. R. Rep. No. 667, 55th Cong., 2d Sess., 1 (1898).

Meanwhile, the Court continued to narrow the reach of the Wilson Act. In *Rhodes* and *Vance*, the Court even more broadly stripped States of their control over liquor regulation. *Rhodes* did so by holding that the phrase "upon arrival in such State" in the Wilson Act meant that state law could regulate imports only after their delivery to a consignee within the State. 170 U. S., at 421 (internal quotation marks omitted). This meant that States could regulate imported liquor, even when in its original package, but only after it had been delivered to the eventual consignee. *Rhodes*, in other words, read the Wilson Act to overturn *Leisy*, but not *Bowman* v. *Chicago & Northwestern R. Co.*, 125 U. S. 465 (1888), which had recognized a constitutional right to import liquor in its original package free from state regulation until it reached its consignee. *Rhodes*, *supra*, at 423. Like *Leisy*, then, *Rhodes* seriously hampered the ability of States to intercept liquor at their borders.

*Vance* involved the constitutionality of a law very similar to the law struck down in *Scott*. After its loss in *Scott*, South Carolina amended its ban on importation. Rather than flatly banning imports unless they went through the state monopoly system, the new law allowed out-of-state wholesalers and manufacturers to ship liquor directly to consumers, but only if the consumer showed that the liquor passed a state-administered test of its purity. *Vance*, 170 U. S., at 454–455.

*Vance* had two distinct holdings. First, the Court struck down this condition on the direct importation of liquor as an impermissible burden on "the constitutional right of the non-resident to ship into the State and of the resident in the State to receive for his own use." *Id.*, at 455. The Court derived the right to direct importation primarily from the "ruling" of *Scott* that a State could not "forbid the shipment

into the State from other States of intoxicating liquors for the use of a resident." 170 U. S., at 452.

Second, the Court held that, apart from its ban on direct shipments of liquor to consumers, South Carolina's monopoly over liquor distribution was otherwise constitutional. *Id.*, at 450–452. It rejected the argument that this monopoly system was unconstitutionally discriminatory. In particular, the Court reasoned that the monopoly system was not discriminatory because *Scott* had held (a holding that *Rhodes* had fortified) that South Carolina consumers had a constitutional right to import liquor for their own personal use, even if a State otherwise monopolized the sale and distribution of liquor.[5] A monopoly system, the Court implied, was nondiscriminatory under the rule of *Scott* only if it also allowed consumers to import liquor from out-of-state shippers for their own personal use. Three Justices in *Vance* dissented from that holding, on the ground that such a state monopoly system constituted unconstitutional discrimination under, among other cases, *Scott* and *Walling* v. *Michigan*, 116 U. S. 446 (1886). 170 U. S., at 462–468 (opinion of Shiras, J., joined by Fuller, C. J., and McKenna, J.).

*Rhodes* and *Vance* swept more broadly than *Scott*. *Rhodes* held that States lacked power to regulate imported liquor before it reached the consignee, regardless of whether the liquor was intended for the consignee's personal use, see *supra*, at 506; it did not, as the Court implies, simply repeat *Scott*'s holding that consumers had a right to import liquor for their own personal use, *ante*, at 480. *Rhodes*' holding,

[5] See *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438, 451–452 (1898) ("But the weight of [the argument that the state monopoly system is discriminatory] is overcome when it is considered that the Interstate Commerce clause of the Constitution guarantees the right to ship merchandise from one State into another, and protects it until the termination of the shipment by delivery at the place of consignment, and this right is wholly unaffected by the act of Congress [*i. e.*, the Wilson Act] which allows state authority to attach to the original package before sale but only after delivery. *Scott* v. *Donald*, *supra*; *Rhodes* v. *Iowa*").

for example, made it easier for bootleggers to circumvent state prohibitions on the resale of imported liquor, because it enabled them to order large quantities of liquor directly from out-of-state interests. For its part, *Vance* held that the right to import for personal use recognized in *Scott* applied even if the State conditioned the right to import directly on compliance with regulatory conditions (*e. g.*, a state-administered purity test). Those broader holdings, consequently, spurred more vigorous congressional attempts to return control of liquor regulation to the States. See R. Hamm, Shaping the Eighteenth Amendment 206–212 (1995) (hereinafter Hamm); Rogers, Interstate Commerce in Intoxicating Liquors Before the Webb-Kenyon Act, 4 Va. L. Rev. 353, 364–365 (1917). The legislative debate in subsequent years accordingly focused on their effect. That may be what misleads the majority into believing that the Webb-Kenyon Act took aim only at *Rhodes* and *Vance*.

Yet early versions of the Webb-Kenyon Act, not to mention the Act itself, also overturned *Scott*'s holding that banning the direct shipment of liquor for personal use was unconstitutionally discriminatory. Like Senator Tillman's initial bill, other early versions of the Webb-Kenyon Act took aim at *Scott*, *Rhodes*, and *Vance*. They made clear that out-of-state liquor was subject to state law immediately upon entering the State's territorial boundaries, even if intended for personal use. See Hamm 206, 208.

The version that eventually became the Webb-Kenyon Act was likewise designed to overturn the holdings of all three cases, and thus to reverse *Scott*'s "nondiscrimination" principle. The House Report says that the bill was "intended to withdraw the protecting hand of interstate commerce from intoxicating liquors transported into a State or Territory and intended to be used therein in violation of the law of such State or Territory." H. R. Rep. No. 1461, 62d Cong., 3d Sess., 1 (1913). Thus, the bill targeted *Scott*'s notion (as applied by *Vance*) that imports destined for personal use were

exempt from state regulation. There was no mention of an exception for "discriminatory" state laws, though such an amendment to an earlier version of the Webb-Kenyon Act had been proposed before, see *supra*, at 505–506; the idea was that imports were subject to state law once within a State's geographic borders, regardless of the law's character. In fact, proponents of the final version of the bill defeated proposed amendments that would have restrained States from restricting imports destined for personal use, and thereby would have left *Scott* intact. Hamm 215; 49 Cong. Rec. 2921 (1913); see also H. R. Rep. No. 2337, 58th Cong., 2d Sess., 2–3 (1904) (prior unenacted version drawing exception for shipments for in-state personal use).

In contrast to those unenacted amendments, the Webb-Kenyon Act reversed *Scott*, *Rhodes*, and *Vance* by forbidding the importation of liquor "intended to be received, possessed, sold or in any manner used . . . in violation of any law of such state"—regardless of the nature of the state law or the imported liquor's intended use. See *Seaboard Air Line R. Co.*, 245 U. S., at 304 (noting that the Webb-Kenyon Act allowed States to regulate "irrespective of any personal right in a consignee there to have and consume liquor"). That is why, just four years after its enactment, this Court described the Webb-Kenyon Act as removing "the protection of interstate commerce away from *all receipt and possession of liquor prohibited by state law.*" *Clark Distilling*, 242 U. S., at 325 (emphasis added).

The foregoing historical account belies the majority's claim that the Webb-Kenyon Act left *Scott* untouched. The Court reasons that the Webb-Kenyon Act overturned only those decisions that "'in effect afford[ed] a means by subterfuge and indirection to set [state liquor laws] at naught,'" *ante*, at 482 (quoting *Clark Distilling*, *supra*, at 324), a description the Court takes to cover *Rhodes* and *Vance*, but not *Scott*. However, *Scott*'s holding, by precluding state monopoly systems from prohibiting direct shipments of liquor to consum-

ers, "set [state liquor laws] at naught" just as *Rhodes* and *Vance* did. The Court concedes that the Webb-Kenyon Act "close[d] the direct-shipment gap" and that *Scott* recognized a constitutional right for consumers to import liquor directly for their own personal use. *Ante*, at 480, 481. These concessions cannot be squared with the Court's simultaneous suggestion, *ante*, at 481–484, that the Webb-Kenyon Act left *Scott* untouched. The only way to overturn *Scott*'s direct-shipment holding was to abrogate its premise that South Carolina's monopoly system was unconstitutionally discriminatory, as Senator Tillman recognized from the start. See *supra*, at 505. Reversing *Scott*'s holding that a State could not ban direct shipments of liquor to consumers was a core concern of the Webb-Kenyon Act.

Repudiating *Scott*'s nondiscrimination holding was also essential to ensuring the constitutionality of state liquor licensing schemes and state monopolies on the sale and distribution of liquor. This is so because the constitutionality of these state systems remained in some doubt even after *Vance*. As explained, *Vance* upheld South Carolina's monopoly system (stripped of its ban on direct shipments) as "nondiscriminatory" only because that system had preserved the constitutional right established in *Scott* and *Rhodes* to send and receive direct shipments of liquor free of state interference. *Supra*, at 506–507. The Court admits that the Webb-Kenyon Act abolished that right. *Ante*, at 481. Had the Webb-Kenyon Act done so without also allowing the States to discriminate, *Vance*'s reasoning implied that the Court was likely to strike down state monopoly systems, and therefore probably licensing schemes as well, as unduly "discriminatory." See 170 U. S., at 451 (equating a state monopoly scheme with a private licensing scheme). The only way to stave off that holding, and so to preserve States' ability to regulate liquor traffic, was to overturn *Scott*'s "nondiscrimination" reasoning. Faced with a Judiciary that had narrowly construed the Wilson Act, see *supra*, at 504–508,

Congress drafted the Webb-Kenyon Act to authorize *all* state regulation of importation, whether or not "discriminatory." Just as *Rhodes* read the Wilson Act to repudiate *Leisy* but not *Bowman*, see *supra*, at 506, the majority reads the Webb-Kenyon Act to repudiate *Rhodes* but not *Scott*, committing an analogous error. I would not so construe the Webb-Kenyon Act.

C

The majority disagrees with this historical account primarily by disputing my reading of *Scott*. It reads *Scott* to have held two things: first, that certain discriminatory provisions of South Carolina's monopoly system were not authorized by the Wilson Act, and therefore were unconstitutional; and second, that Donald had a constitutional right to import liquor directly from out-of-state shippers. *Ante*, at 478–480. This recharacterization of *Scott* (together with its mischaracterization of *Rhodes*' holding, see *supra*, at 506) is the basis for the Court's contention that the Webb-Kenyon Act only overruled *Scott*'s second holding, leaving the first untouched. *Ante*, at 481–484.

The Court misreads *Scott*. *Scott* had only one holding: that the state monopoly system unconstitutionally discriminated against Donald by allowing him to purchase liquor from in-state stores, but not directly from out-of-state interests. The issue of direct importation was squarely at issue in *Scott*, not simply "implicit." *Ante*, at 480. This was the only basis, after all, for affirming Donald's damages award for interference with his ability to import goods directly from outside the State. *Scott*'s reasoning that the South Carolina law was unconstitutionally discriminatory was the basis for affirming that award, not a separate and distinct holding.

While South Carolina law also allowed the state alcohol administrator to discriminate against out-of-state liquor when purchasing liquor for sale through the monopoly system, *ante*, at 478–479, any constitutional defect with those

portions of the law would have been at most grounds for allowing Donald to purchase out-of-state liquor through the state monopoly system, as the dissent argued (and as the majority strains to characterize *Scott*'s actual holding, *ante*, at 479). See 165 U. S., at 104–106 (Brown, J., dissenting). But *Scott* rejected that view and held that the broader discrimination effected by the law was grounds for allowing Donald to import liquor directly himself, bypassing the monopoly system entirely. *Scott*'s holding therefore rested on a conclusion that a ban on direct importation was "discrimination" under the negative Commerce Clause. That conclusion was natural for Justice Shiras, the author of *Scott*, whose view apparently was that all state monopoly systems, even ones that seem nondiscriminatory to our modern eyes, were unconstitutionally discriminatory. See *Vance*, *supra*, at 465, 467 (Shiras, J., dissenting) (citing the nondiscrimination cases *Walling* v. *Michigan*, 116 U. S. 446 (1886), and *Minnesota* v. *Barber*, 136 U. S. 313 (1890)). The Court's narrower understanding of "discrimination" is anachronistic.

*Vance* confirms this reading of *Scott*. *Vance* correctly characterized *Scott* as establishing a right for consumers to receive shipments of liquor directly from out-of-state sources. 170 U. S., at 452. It also characterized *Scott*'s reasoning as resting on the discriminatory character of the state law. 170 U. S., at 449. These two descriptions, taken together, suggest that the discriminatory character of the law was the basis for *Scott*'s holding that Donald had a constitutional right to receive liquor directly, instead of a separate holding. Moreover, *Vance* also implied that a monopoly system that did not allow consumers to receive liquor directly was unconstitutionally discriminatory. See *supra*, at 507. That suggestion supports the idea that *Scott* considered a ban on such direct shipments to be discriminatory.

*Brennen* v. *Southern Express Co.*, 106 S. C. 102, 90 S. E. 402 (1916), likewise bolsters that *Scott* considered South Carolina's ban on direct importation to be unconstitutionally dis-

criminatory, quite apart from the provisions that authorized the state administrator of alcohol to prefer local products over out-of-state ones. See *ante*, at 478–479 (describing discriminatory provisions). In *Brennen*, the court considered the constitutionality of a state monopoly system that channeled all liquor through state dispensaries by banning direct shipments, but that allowed a consumer to import directly one gallon of liquor per month for his own personal use. 106 S. C., at 107–108, 90 S. E., at 403. Though out-of-state liquor had equal access to the state-run liquor dispensaries, see generally 2 S. C. Crim. Code §§ 794–878 (1912) (providing for otherwise nondiscriminatory state-run monopoly system), the court held that this system unconstitutionally discriminated against out-of-state liquor because it allowed consumers to purchase only a limited quantity of liquor via direct shipments, yet unlimited amounts from state stores. The court noted that "there was no limit to the quantity which a citizen who patronized the dispensaries might buy and keep in his possession for personal use," whereas the law limited direct-shipment purchases to a specific quantity each month. 106 S. C., at 108, 90 S. E., at 403. This, the court reasoned, "was, therefore, clearly a discrimination made in favor of liquors bought from the dispensaries," and so was unconstitutionally discriminatory under the rule of *Scott*. 106 S. C., at 108, 90 S. E., at 403–404. The court thus recognized that *Scott*'s reasoning implied that a state monopoly system was unconstitutionally discriminatory unless it allowed consumers to purchase liquor directly from out-of-state shippers on the same terms as they could purchase liquor from the state monopoly system.

*Brennen* refutes the Court's characterization of *Scott*. It shows that the South Carolina system at issue in *Scott* was "discriminatory" because it banned direct importation, not because its provisions authorized the state alcohol administrator to prefer local products. Even the Court concedes that the Webb-Kenyon Act abrogated the right to direct im-

portation recognized in *Scott*. See *ante*, at 480, 481. It follows that the Act also overturned the nondiscrimination reasoning that was the foundation of that right.

In sum, the Webb-Kenyon Act authorizes the discriminatory state laws before the Court today.

## II

There is no need to interpret the Twenty-first Amendment, because the Webb-Kenyon Act resolves these cases. However, the state laws the Court strikes down are lawful under the plain meaning of §2 of the Twenty-first Amendment, as this Court's case law in the wake of the Amendment and the contemporaneous practice of the States reinforce.

### A

Section 2 of the Twenty-first Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." As the Court notes, *ante*, at 484, this language tracked the Webb-Kenyon Act by authorizing state regulation that would otherwise conflict with the negative Commerce Clause. To remove any doubt regarding its broad scope, the Amendment simplified the language of the Webb-Kenyon Act and made clear that States could regulate importation destined for in-state delivery free of negative Commerce Clause restraints. Though the Twenty-first Amendment mirrors the basic terminology of the Webb-Kenyon Act, its language is broader, authorizing States to regulate all "transportation or importation" that runs afoul of state law. The broader language even more naturally encompasses discriminatory state laws. Its terms suggest, for example, that a State may ban imports entirely while leaving in-state liquor unregulated, for they do not condition the State's ability to prohibit imports on the manner in which state law treats domestic products.

The state laws at issue in these cases fall within § 2's broad terms. They prohibit wine manufacturers from "transport[ing] or import[ing]" wine directly to consumers in New York and Michigan "for delivery or use therein." Michigan law does so by requiring all out-of-state wine manufacturers to distribute wine through licensed in-state wholesalers. *Ante*, at 468–469. New York law does so by prohibiting out-of-state wineries from shipping wine directly to consumers unless they establish an in-state physical presence, something that in-state wineries naturally have. *Ante*, at 470, 474–476. The Twenty-first Amendment prohibits out-of-state wineries from shipping wine into Michigan and New York in violation of these laws. In holding that the Constitution prohibits Michigan's and New York's laws, the majority turns the Amendment's text on its head.

The majority's holding is also at odds with this Court's early Twenty-first Amendment case law. In *State Bd. of Equalization of Cal.* v. *Young's Market Co.*, 299 U. S. 59 (1936), this Court considered the constitutionality of a California law that facially discriminated against beer importers and, by extension, out-of-state producers. The California law required wholesalers to pay a special $500 license fee to import beer, in addition to the $50 fee California charged for wholesalers to distribute beer generally. *Id.*, at 60–61. California law thus discriminated against out-of-state beer by charging wholesalers of imported beer 11 times the fee charged to wholesalers of domestic beer.

*Young's Market* held that this explicit discrimination against out-of-state beer products came within the terms of the Twenty-first Amendment, and therefore did not run afoul of the negative Commerce Clause. The Court reasoned that the Twenty-first Amendment's words are "apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes." *Id.*, at 62. The Court rejected the argument that a State "must let imported liquors compete with the domestic on equal terms,"

declaring that "[t]o say that, would involve not a construction of the Amendment, but a rewriting of it." *Ibid.* It recognized that a State could adopt a "discriminatory" regulation of out-of-state manufacturers as an incident to a "lesser degree of regulation than total prohibition," for example, by imposing "a state monopoly of the manufacture and sale of beer," or by "channel[ing] desired importations by confining them to a single consignee." *Id.*, at 63 (punctuation omitted). And far from "[not] consider[ing]" the historical argument that forms the core of the majority's reasoning, *ante*, at 485, *Young's Market* expressly rejected its relevance:

> "The plaintiffs argue that limitation of the broad language of the Twenty-first Amendment is sanctioned by its history; and by the decisions of this Court on the Wilson Act, the Webb-Kenyon Act and the Reed Amendment. As we think the language of the Amendment is clear, we do not discuss these matters." 299 U. S., at 63–64 (footnote omitted).

The plaintiffs in *Young's Market* advanced virtually the same historical argument the Court today accepts. Brief for Appellees, O. T. 1936, No. 22, pp. 57–75. *Young's Market* properly reasoned that the text of our Constitution is the best guide to its meaning. That logic requires sustaining the state laws that the Court invalidates.

*Young's Market* was no outlier. The next Term, the Court upheld a Minnesota law that prohibited the importation of 50-proof liquor, concluding that "discrimination against imported liquor is permissible." *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401, 403 (1938). One Term after that, the Court upheld two state laws that prohibited the importation of liquor from States that discriminated against domestic liquor. See *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U. S. 391, 394 (1939) (noting that the Twenty-first Amendment permitted States to "discriminat[e] between domestic and imported intoxicating liquors");

*Joseph S. Finch & Co.* v. *McKittrick*, 305 U. S. 395, 398 (1939). In sum, the Court recognized from the start that "[t]he Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause." *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132, 138 (1939); accord, *Duckworth* v. *Arkansas*, 314 U. S. 390, 398–399 (1941) (Jackson, J., concurring in result); *Carter* v. *Virginia*, 321 U. S. 131, 138–139 (1944) (Black, J., concurring); *id.*, at 139–143 (Frankfurter, J., concurring). The majority gives short shrift to these persuasive contemporaneous constructions of the Twenty-first Amendment, as JUSTICE STEVENS properly stresses. *Ante*, at 495 (dissenting opinion).

B

The widespread, unquestioned acceptance of the three-tier system of liquor regulation, see *ante*, at 466–467, and the contemporaneous practice of the States following the ratification of the Twenty-first Amendment confirm that the Amendment freed the States from negative Commerce Clause restraints on discriminatory regulation. Like the Webb-Kenyon Act, the Twenty-first Amendment was designed to remove any doubt regarding whether state monopoly and licensing schemes violated the Commerce Clause, as the majority properly acknowledges. *Ante*, at 488–489; see also *supra*, at 510–511. Accordingly, in response to the end of Prohibition, States that made liquor legal imposed either state monopoly systems, or licensing schemes strictly circumscribing the ability of private interests to sell and distribute liquor within state borders. Skilton, State Power Under the Twenty-First Amendment, 7 Brooklyn L. Rev. 342, 345–346 (1938); L. Harrison & E. Laine, After Repeal: A Study of Liquor Control Administration 43 (1936).

These liquor regulation schemes discriminated against out-of-state economic interests, just as Michigan's and New York's direct-shipment laws do. State monopolies that did not permit direct shipments to consumers, for example, were

thought to discriminate against out-of-state wholesalers and retailers by favoring in-state products. See *Vance*, 170 U. S., at 451–452; *supra*, at 507. Private licensing schemes discriminated as well, often by requiring in-state residency or physical presence as a condition of obtaining licenses.[6] Even today, the requirement that liquor pass through a licensed in-state wholesaler is a core component of the three-tier system. As the Court concedes, each of these schemes is within the ambit of the Twenty-first Amendment, even though each discriminates against out-of-state interests. *Ante*, at 466–467, 488–489.

Many States had laws that discriminated against out-of-state products in addition to out-of-state wholesalers and retailers. See Kallenbach, Interstate Commerce in Intox-

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[6] See Note, Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-First Amendment, 72 Harv. L. Rev. 1145, 1148–1149, and n. 25 (1959) (hereinafter Economic Localism); see also 3 Colo. Stat. Ann., ch. 89, § 4(a) (1935) (residency requirement); 17 Fla. Stat. Ann. § 561.24 (1941) (prohibiting out-of-state manufacturers from being distributors); Ill. Rev. Stat., ch. 43, § 120 (Smith-Hurd 1937) (residency requirement); Ind. Stat. Ann. § 3730(c) (1934) (residency requirement); 1 Md. Ann. Code, Art. 2B, § 13 (1939) (residency requirement); 4B Ann. Laws of Mass., ch. 138, §§ 18, 18A (1965) (residency requirements); 5 Comp. Laws Mich. § 9209–32 (Supp. 1935) (residency requirement); 1 Mo. Rev. Stat. § 4906 (1939) (citizenship requirement); Neb. Comp. Stat., ch. 53, Art. 3, § 53–328 (1929 and Cum. Supp. 1935) (residency requirement), § 53–317 (physical presence requirement); 1 Nev. Comp. Laws § 3690.05 (Supp. 1931–1941) (residency and physical presence requirements); 2 Rev. Stat. of N. J. § 33:1–25 (1937) (citizenship and residency requirements); N. C. Code Ann. § 3411(103)(1½) (1939) (residency requirement); 1 N. D. Rev. Code § 5–0202 (1943) (citizenship and residency requirements); Ohio Code Ann. § 6064–17 (1936) (residency and physical presence requirements); R. I. Gen. Laws, ch. 163, § 4 (1938) (residency requirement); 1 S. D. Code § 5.0204 (1939) (residency requirement); Vt. Rev. Stat., Tit. 28, ch. 271, § 6156 (1947) (residency requirement); 8 Rev. Stat. Wash. § 7306–23G (Supp. 1940) (physical presence requirement), § 7306–27 (citizenship and residency requirements); Wis. Stat. § 176.05(9) (1937) (citizenship and residency requirements); Wyo. Rev. Stat. Ann. § 59–104 (Supp. 1940) (citizenship and residency requirements).

icating Liquors Under the Twenty-First Amendment, 14 Temp. L. Q. 474, 483–484 (1940); T. Green, Liquor Trade Barriers: Obstructions to Interstate Commerce in Wine, Beer, and Distilled Spirits 12–19, and App. I (1940) (hereinafter Green).[7] For example, 21 States required that producers who had no physical presence within the State first obtain a special license or certificate before doing business within the State, thus subjecting them to two layers of licensing fees. *Id.*, at 12. Thirteen States charged lower licensing fees for wine manufacturers who used locally grown grapes. *Id.*, at 13. Arkansas went so far as to create a blanket exception to its licensing scheme for locally produced wine. See 2 Pope's Digest of Stat. of Ark. §§ 14099, 14105, 14113 (1937). Eight States taxed out-of-state liquor products at greater rates than in-state products. Green 13. Twenty-nine States exempted exports from excise taxes that were applicable to imports. *Id.*, at 14. At least 10 States (plus the District of Columbia) imposed special licensing requirements on solicitors of out-of-state liquor products. See Harrison & Laine, *supra*, at 194–195. Like the California law upheld in *Young's Market*, 10 States charged wholesalers who dealt in imports greater licensing fees. Economic Localism 1150; Crabb, State Power Over Liquor Under the Twenty-First Amendment, 12 U. Det. L. J. 11, 27 (1948); Green 13. Many States also passed antiretaliation statutes limiting or banning imports from other States that themselves discriminated against out-of-state liquor. Economic Localism 1152; Green 14. All told, at least 41 States had some sort of law

[7] See also, *e. g.*, Ill. Rev. Stat., ch. 43, § 115(h) (Smith-Hurd 1937) (special license for growers of locally grown grapes); 5 Comp. Laws Mich. § 9209–55 (Supp. 1935) (exemption from malt tax for in-state manufacturers); 1 Nev. Comp. Laws § 3690.15 (Supp. 1931–1941) (special importer's fees; lower license fees for manufacturers and wholesalers who deal in in-state products); N. M. Stat. Ann. § 72–806 (Supp. 1938) (licensing exemption for in-state wineries); R. I. Gen. Laws Ann., ch. 167, § 8 (1938) (authorizing state agency to impose retaliatory tax); Utah Rev. Stat. § 46–8–3 (Supp. 1939) (requiring state commission to prefer locally grown products).

that discriminated against out-of-state products, many if not most of which (contrary to the Court's suggestion, *ante*, at 485) predated *Young's Market* and its progeny. See, *e. g.*, Green App. I. This contemporaneous state practice refutes the Court's assertion, *ante*, at 484–485, 488–489, that the Twenty-first Amendment allowed States to discriminate against out-of-state wholesalers and retailers, but not against out-of-state products.

Rather than credit the lay consensus this state practice reflects, the Court relies instead on scattered academic and judicial commentary arguing that the Twenty-first Amendment did not permit States to enact discriminatory liquor legislation. *Ante*, at 485–486. Most of the commentators and judges the Court cites did not adopt the construction of the Amendment the Court embraces. For example, some argued that the Twenty-first Amendment only allowed States to enact nondiscriminatory prohibition laws—*i. e.*, to allow "dry states to remain dry." See Note, 55 Yale L. J. 815, 816–817 (1946); de Ganahl, The Scope of Federal Power Over Alcoholic Beverages Since the Twenty-First Amendment, 8 Geo. Wash. L. Rev. 819, 822–823 (1940); Friedman, Constitutional Law: State Regulation of Importation of Intoxicating Liquor Under Twenty-First Amendment, 21 Cornell L. Q. 504, 511–512 (1936); Recent Cases, Constitutional Law—Twenty-first Amendment, 85 U. Pa. L. Rev. 322, 323 (1937); W. Hamilton, Price and Price Policies 426 (1938). The Court, by contrast, concedes that a State could have a discriminatory licensing or monopoly scheme. *Ante*, at 488–489. The Court must concede this, given that state practice shows that the Twenty-first Amendment authorized such practices, and given that the Webb-Kenyon Act allowed States to enforce their own licensing laws, even if they did not prohibit the use and consumption of liquor entirely. Others apparently defended the position that the Twenty-first Amendment did no more than prevent Congress from permitting the direct importation of liquor into a State, leav-

ing the Constitution untouched. See *Joseph Triner Corp.* v. *Arundel*, 11 F. Supp. 145, 146–147 (Minn. 1935); *Young's Market Co.* v. *State Bd. of Equalization of Cal.*, 12 F. Supp. 140, 142 (SD Cal. 1935), rev'd, 299 U. S. 59 (1936). Still others did not state a clear view on the scope of the Twenty-first Amendment. See generally Legislation, Liquor Control, 38 Colum. L. Rev. 644 (1938); Wiser & Arledge, Does the Repeal Amendment Empower a State to Erect Tariff Barriers and Disregard the Equal Protection Clause in Legislating on Intoxicating Liquors in Interstate Commerce? 7 Geo. Wash. L. Rev. 402 (1939) (arguing that the Twenty-first Amendment did not repeal the Equal Protection Clause). Instead of following this confused mishmash of elite opinion—the same sort of elite opinion that drove the expansive interpretation of the negative Commerce Clause that prompted the Twenty-first Amendment—I would credit the uniform practice of the States whose people ratified the Twenty-first Amendment. See *ante*, at 496–497 (STEVENS, J., dissenting).

The majority's reliance on the difference between discrimination against manufacturers (and therefore, their products) and discrimination against wholesalers and retailers is difficult to understand. The pre-Twenty-first Amendment "nondiscrimination" principle enshrined in this Court's negative Commerce Clause cases could not have prohibited discrimination against the producers of out-of-state goods, while permitting discrimination against out-of-state services like wholesaling and retailing. See *Lewis* v. *BT Investment Managers, Inc.*, 447 U. S. 27, 42 (1980) (invalidating state law that discriminated against banks, bank holding companies, and trust companies with out-of-state business operations); *Memphis Steam Laundry Cleaner, Inc.* v. *Stone*, 342 U. S. 389, 394–395 (1952) (invalidating tax that discriminated against solicitors for out-of-state-licensed businesses). Discrimination against out-of-state wholesalers and retailers also risks allowing "economic protectionism." The Court's

concession that the Twenty-first Amendment allowed States to require all liquor traffic to pass through in-state wholesalers and retailers shows that States may also have direct-shipment laws that discriminate against out-of-state wineries.

III

Though the majority dismisses this Court's early Twenty-first Amendment case law, it relies on the reasoning, if not the holdings, of our more recent Twenty-first Amendment cases. *Ante*, at 486–489. But the Court's later cases do not require the result the majority reaches. Moreover, I would resolve any conflict in this Court's precedents in favor of those cases most contemporaneous with the ratification of the Twenty-first Amendment.

A

The test set forth in this Court's more recent Twenty-first Amendment cases shows that Michigan's and New York's direct-shipment laws are constitutional. In *Bacchus Imports, Ltd.* v. *Dias*, 468 U. S. 263 (1984), this Court established a standard for determining when a discriminatory state liquor regulation is permissible under the Twenty-first Amendment. At issue in *Bacchus* was a Hawaii statute that imposed a 20 percent excise tax on liquor, but exempted certain locally produced products from the tax. The Court held that the Twenty-first Amendment did not save the discriminatory tax. The Court reasoned that the Twenty-first Amendment did not permit state laws that constituted "mere economic protectionism," because the Twenty-first Amendment's "central purpose . . . was not to empower States to favor local liquor industries by erecting barriers to competition." *Id.*, at 276. The Court noted that the State did "not seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment, but instead acknowledg[ed] that the purpose was 'to promote a local industry.'" *Ibid.* (quot-

ing Brief for Appellee Dias, O. T. 1983, No. 82–1565, p. 40). The Court therefore struck down the tax, "because [it] violate[d] a central tenet of the Commerce Clause but [was] not supported by any clear concern of the Twenty-first Amendment." 468 U. S., at 276; accord, *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. 573, 584–585 (1986) ("Our task . . . is to reconcile the interests protected by the" Twenty-first Amendment and the negative Commerce Clause).

Michigan's and New York's direct-shipment laws are constitutional under *Bacchus*. Allowing States to regulate the direct shipment of liquor was of "clear concern" to the framers of the Webb-Kenyon Act and the Twenty-first Amendment. *Bacchus*, *supra*, at 276. The driving force behind the passage of the Webb-Kenyon Act was a desire to reverse this Court's decisions that had precluded States from regulating the direct shipment of liquor by out-of-state interests. See *supra*, at 508–509. The laws struck down in *Scott*, 165 U. S. 58 (1897), and *Vance* v. *W. A. Vandercook Co.*, 170 U. S. 438 (1898), required out-of-state manufacturers to ship liquor through the State's liquor regulation scheme—exactly what the Michigan and New York schemes do. By contrast, there is little evidence that purely protectionist tax exemptions like those at issue in *Bacchus* were of any concern to the framers of the Act and the Amendment.

Moreover, if the three-tier liquor regulation system falls within the "core concerns" of the Twenty-first Amendment, then so do Michigan's and New York's direct-shipment laws. The same justifications for requiring wholesalers and retailers to be in-state businesses equally apply to Michigan's and New York's direct-shipment laws. For example, States require liquor to be shipped through in-state wholesalers because it is easier to regulate in-state wholesalers and retailers. State officials can better enforce their regulations by inspecting the premises and attaching the property of in-state entities; "[p]resence ensures accountability." 358 F. 3d

223, 237 (CA2 2004). It is therefore understandable that the framers of the Twenty-first Amendment and the Webb-Kenyon Act would have wanted to free States to discriminate between in-state and out-of-state wholesalers and retailers, especially in the absence of the modern technological improvements and federal enforcement mechanisms that the Court argues now make regulating liquor easier. *Ante*, at 492. Michigan's and New York's laws simply allow some in-state wineries to act as their own wholesalers and retailers in limited circumstances. If allowing a State to require all wholesalers and retailers to be in-state companies is a core concern of the Twenty-first Amendment, so is allowing a State to select only in-state manufacturers to ship directly to consumers, and therefore act, in effect, as their own wholesalers and retailers.

B

The Court places much weight upon the authority of *Bacchus*. *Ante*, at 487–488. This is odd, because the Court does not even mention, let alone apply, the "core concerns" test that *Bacchus* established. The Court instead *sub silentio* casts aside that test, employing otherwise-applicable negative Commerce Clause scrutiny and giving no weight to the Twenty-first Amendment and the Webb-Kenyon Act. *Ante*, at 472–476, 489–493. The Court therefore at least implicitly acknowledges the unprincipled nature of the test *Bacchus* established and the grave departure *Bacchus* was from this Court's precedents. See 468 U. S., at 278–287 (STEVENS, J., dissenting); *James B. Beam Distilling Co.* v. *Georgia*, 501 U. S. 529, 554–557 (1991) (O'CONNOR, J., dissenting). *Bacchus* should be overruled, not fortified with a textually and historically unjustified "nondiscrimination against products" test.

*Bacchus*' reasoning is unpersuasive. It swept aside the weighty authority of this Court's early Twenty-first Amendment case law, see 468 U. S., at 281–282 (STEVENS, J., dissenting), because the *Bacchus* Court thought it "'an absurd

oversimplification'" to conclude that "'the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause,'" *id.*, at 275 (quoting *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 331–332 (1964)). The Twenty-first Amendment did not impliedly repeal the Commerce Clause, but that does not justify *Bacchus*' narrowing of the Twenty-first Amendment to its "core concerns."

The Twenty-first Amendment's text has more modest effect than *Bacchus* supposed. Though its terms are broader than the Webb-Kenyon Act, the Twenty-first Amendment also parallels the Act's structure. In particular, the Twenty-first Amendment provides that any importation into a State contrary to state law violates the Constitution, just as the Webb-Kenyon Act provides that any such importation contrary to state law violates federal law. Its use of those same terms of art shows that just as the Webb-Kenyon Act repealed liquor's negative Commerce Clause immunity, the Twenty-first Amendment likewise insulates state liquor laws from negative Commerce Clause scrutiny. Authorizing States to regulate liquor importation free from negative Commerce Clause restraints is a far cry from precluding Congress from regulating in that field at all. See *Bacchus*, *supra*, at 279, n. 5 (STEVENS, J., dissenting). Moreover, *Bacchus*' concern that the Twenty-first Amendment repealed the Commerce Clause is no excuse for ignoring the independent force of the Webb-Kenyon Act, which equally divested discriminatory state liquor laws of Commerce Clause immunity.

Stripped of *Bacchus*, the Court's holding is bereft of support in our cases. *Bacchus* is the only decision of this Court holding that the Twenty-first Amendment does not authorize the in-state regulation of imported liquor free of the negative Commerce Clause. Given the uniformity of our early case law supporting even discriminatory state laws regulating imports into States, then, Michigan's and New York's laws easily pass muster under this Court's cases.

Nevertheless, in support of *Bacchus*' holding that "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," *ante*, at 487, the Court cites *Brown-Forman Distillers Corp.* v. *New York State Liquor Authority*, 476 U. S. 573 (1986), and *Healy* v. *Beer Institute*, 491 U. S. 324 (1989). *Ante*, at 487. At issue in those cases was the constitutionality of protectionist legislation that controlled the price of liquor in other States. *Brown-Forman*, *supra*, at 582–583; *Healy*, *supra*, at 337–338. In invalidating such a statute, *Brown-Forman* found that the Twenty-first Amendment, by its terms, gives "New York only the authority to control sales of liquor in New York, and confers no authority to control sales in other States." 476 U. S., at 585; see also *Healy*, *supra*, at 342–343 (following *Brown-Forman*'s construction). *Brown-Forman* and *Healy* are beside the point in these cases. *Brown-Forman* did not involve a facially discriminatory law. See 476 U. S., at 579. And unlike *Healy*, there is no claim here that the Michigan and New York laws do anything but regulate within their own borders, thereby interfering with the ability of other States to exercise their own Twenty-first Amendment power.

Equally inapposite are the cases the Court cites concerning state laws that violate other provisions of the Constitution or Acts of Congress. *Ante*, at 486–487. Cases involving the relation between the Twenty-first Amendment and Congress' affirmative Commerce Clause power are irrelevant to whether the Twenty-first Amendment protects state power against the negative implications of the Commerce Clause. See *James B. Beam*, *supra*, at 556 (O'CONNOR, J., dissenting); *Bacchus*, *supra*, at 279, and n. 5 (STEVENS, J., dissenting). Similarly, my interpretation of the Twenty-first Amendment would not free States to regulate liquor unhampered by other constitutional restraints, like the First Amendment and the Equal Protection Clause. As this Court explained in *Craig* v. *Boren*, 429 U. S. 190, 205–207 (1976), the text and history of the Twenty-first Amendment

demonstrate that it displaces liquor's negative Commerce Clause immunity, not other constitutional provisions.

## IV

The Court begins its opinion by detailing the evils of state laws that restrict the direct shipment of wine. *Ante*, at 466–468. It stresses, for example, the Federal Trade Commission's opinion that allowing the direct shipment of wine would enhance consumer welfare. FTC, Possible Anticompetitive Barriers to E-Commerce: Wine 3–5 (July 2003), available at http://www.ftc.gov/os/2003/07/winereport2.pdf (as visited May 12, 2005, and available in Clerk of Court's case file). The Court's focus on these effects suggests that it believes that its decision serves this Nation well. I am sure that the judges who repeatedly invalidated state liquor legislation, even in the face of clear congressional direction to the contrary, thought the same. See *supra*, at 503–508. The Twenty-first Amendment and the Webb-Kenyon Act took those policy choices away from judges and returned them to the States. Whatever the wisdom of that choice, the Court does this Nation no service by ignoring the textual commands of the Constitution and Acts of Congress. The Twenty-first Amendment and the Webb-Kenyon Act displaced the negative Commerce Clause as applied to regulation of liquor imports into a State. They require sustaining the constitutionality of Michigan's and New York's direct-shipment laws. I respectfully dissent.

Syllabus

# LINGLE, GOVERNOR OF HAWAII, ET AL. *v.* CHEVRON U. S. A. INC.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 04–163. Argued February 22, 2005—Decided May 23, 2005

Concerned about the effects of market concentration on retail gasoline prices, the Hawaii Legislature passed Act 257, which limits the rent oil companies may charge dealers leasing company-owned service stations. Respondent Chevron U. S. A. Inc., then one of the largest oil companies in Hawaii, brought this suit seeking a declaration that the rent cap effected an unconstitutional taking of its property and an injunction against application of the cap to its stations. Applying *Agins* v. *City of Tiburon*, 447 U. S. 255, 260—where this Court declared that government regulation of private property "effects a taking if [it] does not substantially advance legitimate state interests"—the District Court held that the rent cap effects an uncompensated taking in violation of the Fifth and Fourteenth Amendments because it does not substantially advance Hawaii's asserted interest in controlling retail gas prices. The Ninth Circuit affirmed.

*Held: Agins'* "substantially advance[s]" formula is not an appropriate test for determining whether a regulation effects a Fifth Amendment taking. Pp. 536–548.

(a) The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property. See, *e. g., United States* v. *Pewee Coal Co.*, 341 U. S. 114. Beginning with *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, however, the Court recognized that government regulation of private property may be so onerous that its effect is tantamount to a direct appropriation or ouster. Regulatory actions generally will be deemed *per se* takings for Fifth Amendment purposes (1) where government requires an owner to suffer a permanent physical invasion of her property, see *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419, or (2) where regulations completely deprive an owner of "*all* economically beneficial us[e]" of her property, *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1019. Outside these two categories (and the special context of land-use exactions discussed below), regulatory takings challenges are governed by *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 124. *Penn Central* identified several factors—including the regulation's economic impact on the claimant, the extent to which it interferes

with distinct investment-backed expectations, and the character of the government action—that are particularly significant in determining whether a regulation effects a taking. Because the three inquiries reflected in *Loretto*, *Lucas*, and *Penn Central* all aim to identify regulatory actions that are functionally equivalent to a direct appropriation of or ouster from private property, each of them focuses upon the severity of the burden that government imposes upon property rights. Pp. 536–540.

(b) The "substantially advances" formula is not a valid method of identifying compensable regulatory takings. It prescribes an inquiry in the nature of a due process test, which has no proper place in the Court's takings jurisprudence. The formula unquestionably was derived from due process precedents, since *Agins* supported it with citations to *Nectow* v. *Cambridge*, 277 U. S. 183, 185, and *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 395. Although *Agins*' reliance on those precedents is understandable when viewed in historical context, the language the Court selected was imprecise. It suggests a means-ends test, asking, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose. Such an inquiry is not a valid method of discerning whether private property has been "taken" for Fifth Amendment purposes. In stark contrast to the three regulatory takings tests discussed above, the "substantially advances" inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights or how any regulatory burden is *distributed* among property owners. Thus, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause. Moreover, the *Agins* formula's application as a takings test would present serious practical difficulties. Reading it to demand heightened means-ends review of virtually all regulation of private property would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which they are not well suited. It would also empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies. Pp. 540–545.

(c) The Court's holding here does not require it to disturb any of its prior holdings. Although it applied a "substantially advances" inquiry in *Agins* itself, see 447 U. S., at 261–262, and arguably in *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 485–492, it has never found a compensable taking based on such an inquiry. Moreover, in most of the cases reciting the *Agins* formula, the Court has merely

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assumed its validity when referring to it in dicta. See, *e. g.*, *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 334. Although *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825, 834, and *Dolan* v. *City of Tigard*, 512 U. S. 374, 385, drew upon *Agins*' language, the rule those cases established is entirely distinct from the "substantially advances" test: They involved a special application of the "doctrine of unconstitutional conditions," which provides that the government may not require a person to give up the constitutional right to receive just compensation when property is taken for a public use in exchange for a discretionary benefit that has little or no relationship to the property. 512 U. S., at 385. Pp. 545–548.

(d) A plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed by alleging a "physical" taking, a *Lucas*-type total regulatory taking, a *Penn Central* taking, or a land-use exaction violating the *Nollan* and *Dolan* standards. Because Chevron argued only a "substantially advances" theory, it was not entitled to summary judgment on its takings claim. P. 548.

363 F. 3d 846, reversed and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion, *post*, p. 548.

*Mark J. Bennett*, Attorney General of Hawaii, argued the cause for petitioners. With him on the briefs were *Michael L. Meaney*, Deputy Attorney General, *Seth P. Waxman*, *Paul R. Q. Wolfson*, *Robert G. Dreher*, and *John D. Echeverria*.

*Deputy Solicitor General Kneedler* argued the cause for the United States as *amicus curiae* in support of petitioners. With him on the brief were *Acting Solicitor General Clement*, *Assistant Attorney General Keisler*, *Malcolm L. Stewart*, *Mark B. Stern*, and *Sharon Swingle*.

*Craig E. Stewart* argued the cause for respondent. With him on the brief were *Donald B. Ayer*, *Michael S. Fried*, and *Louis K. Fisher*.*

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*Briefs of *amici curiae* urging reversal were filed for the State of New York et al. by *Eliot Spitzer*, Attorney General of New York, *Caitlin J. Halligan*, Solicitor General, *Daniel Smirlock*, Deputy Solicitor General, and *John J. Sipos*, Assistant Attorney General, by *Bill Lockyer*, Attorney General of California, *Manuel Medeiros*, State Solicitor General, *Thomas Greene*, Chief Assistant Attorney General, *J. Matthew Rodriquez*, Senior

JUSTICE O'CONNOR delivered the opinion of the Court.

On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase—however fortuitously coined. A quarter century ago, in *Agins* v. *City of Tiburon*, 447 U. S. 255 (1980), the Court declared that government regulation of private property "effects a taking if [such regulation] does not substantially advance legitimate state interests . . . ." *Id.*, at 260. Through reiteration in a half dozen or so decisions since *Agins*, this

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Assistant Attorney General, and *Daniel L. Siegel*, Supervising Deputy Attorney General, by *William Vázquez Irizarry*, Secretary of Justice of Puerto Rico, and by the Attorneys General for their respective jurisdictions as follows: *Gregg D. Renkes* of Alaska, *Fiti Sunia* of American Samoa, *Terry Goddard* of Arizona, *Ken Salazar* of Colorado, *Richard Blumenthal* of Connecticut, *M. Jane Brady* of Delaware, *Douglas B. Moylan* of Guam, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Gregory D. Stumbo* of Kentucky, *G. Steven Rowe* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Mike Hatch* of Minnesota, *Jim Hood* of Mississippi, *Mike McGrath* of Montana, *Peter C. Harvey* of New Jersey, *Pamela Brown* of the Northern Mariana Islands, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Gerald J. Pappert* of Pennsylvania, *Patrick Lynch* of Rhode Island, *Paul G. Summers* of Tennessee, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Iver A. Stridiron* of the Virgin Islands, *Christine O. Gregoire* of Washington, and *Darrell V. McGraw, Jr.*, of West Virginia; for the American Planning Association by *Edward J. Sullivan;* for the League of California Cities by *Andrew W. Schwartz;* for the National Conference of State Legislatures et al. by *Richard Ruda, Timothy J. Dowling,* and *Jason C. Rylander;* and for the Service Station Dealers of America by *Peter H. Gunst.*

Briefs of *amici curiae* urging affirmance were filed for the Action Apartment Association, Inc., by *Rosario Perry;* for the Cato Institute by *Richard A. Epstein;* for Equity Lifestyle Properties, Inc., et al. by *David J. Bradford, David W. DeBruin,* and *Terri L. Mascherin;* for Manufactured Housing Communities of Arizona, Inc., by *Michael A. Parham;* for the National Association of Home Builders by *Michael M. Berger* and *Duane J. Desiderio;* for the Pacific Legal Foundation et al. by *R. S. Radford* and *Nancie G. Marzulla;* for the Small Property Owners of San Francisco Institute et al. by *Paul F. Utrecht;* and for Charles W. Coupe et al. by *Kenneth R. Kupchak* and *Robert H. Thomas.*

language has been ensconced in our Fifth Amendment takings jurisprudence. See *Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U. S. 687, 704 (1999) (citing cases).

In the case before us, the lower courts applied *Agins'* "substantially advances" formula to strike down a Hawaii statute that limits the rent that oil companies may charge to dealers who lease service stations owned by the companies. The lower courts held that the rent cap effects an uncompensated taking of private property in violation of the Fifth and Fourteenth Amendments because it does not substantially advance Hawaii's asserted interest in controlling retail gasoline prices. This case requires us to decide whether the "substantially advances" formula announced in *Agins* is an appropriate test for determining whether a regulation effects a Fifth Amendment taking. We conclude that it is not.

## I

The State of Hawaii, whose territory comprises an archipelago of 132 islands clustered in the midst of the Pacific Ocean, is located over 1,600 miles from the U. S. mainland and ranks among the least populous of the 50 States. Because of Hawaii's small size and geographic isolation, its wholesale market for oil products is highly concentrated. When this lawsuit began in 1997, only two refineries and six gasoline wholesalers were doing business in the State. As of that time, respondent Chevron U. S. A. Inc. was the largest refiner and marketer of gasoline in Hawaii: It controlled 60 percent of the market for gasoline produced or refined in-state and 30 percent of the wholesale market on the State's most populous island, Oahu.

Gasoline is sold at retail in Hawaii from about 300 different service stations. About half of these stations are leased from oil companies by independent lessee-dealers, another 75 or so are owned and operated by "open" dealers, and the remainder are owned and operated by the oil companies. Chevron sells most of its product through 64 independent

lessee-dealer stations. In a typical lessee-dealer arrangement, Chevron buys or leases land from a third party, builds a service station, and then leases the station to a dealer on a turnkey basis. Chevron charges the lessee-dealer a monthly rent, defined as a percentage of the dealer's margin on retail sales of gasoline and other goods. In addition, Chevron requires the lessee-dealer to enter into a supply contract, under which the dealer agrees to purchase from Chevron whatever is necessary to satisfy demand at the station for Chevron's product. Chevron unilaterally sets the wholesale price of its product.

The Hawaii Legislature enacted Act 257 in June 1997, apparently in response to concerns about the effects of market concentration on retail gasoline prices. See 1997 Haw. Sess. Laws no. 257, § 1. The statute seeks to protect independent dealers by imposing certain restrictions on the ownership and leasing of service stations by oil companies. It prohibits oil companies from converting existing lessee-dealer stations to company-operated stations and from locating new company-operated stations in close proximity to existing dealer-operated stations. Haw. Rev. Stat. §§ 486H–10.4(a), (b) (1998 Cum. Supp.). More importantly for present purposes, Act 257 limits the amount of rent that an oil company may charge a lessee-dealer to 15 percent of the dealer's gross profits from gasoline sales plus 15 percent of gross sales of products other than gasoline. § 486H–10.4(c).

Thirty days after Act 257's enactment, Chevron sued the Governor and Attorney General of Hawaii in their official capacities (collectively Hawaii) in the United States District Court for the District of Hawaii, raising several federal constitutional challenges to the statute. As pertinent here, Chevron claimed that the statute's rent cap provision, on its face, effected a taking of Chevron's property in violation of the Fifth and Fourteenth Amendments. Chevron sought a declaration to this effect as well as an injunction against the application of the rent cap to its stations. Chevron swiftly

moved for summary judgment on its takings claim, arguing that the rent cap does not substantially advance any legitimate government interest. Hawaii filed a cross-motion for summary judgment on all of Chevron's claims.

To facilitate resolution of the summary judgment motions, the parties jointly stipulated to certain relevant facts. They agreed that Act 257 reduces by about $207,000 per year the aggregate rent that Chevron would otherwise charge on 11 of its 64 lessee-dealer stations. On the other hand, the statute allows Chevron to collect more rent than it would otherwise charge at its remaining 53 lessee-dealer stations, such that Chevron could increase its overall rental income from all 64 stations by nearly $1.1 million per year. The parties further stipulated that, over the past 20 years, Chevron has not fully recovered the costs of maintaining lessee-dealer stations in any State through rent alone. Rather, the company recoups its expenses through a combination of rent and product sales. Finally, the joint stipulation states that Chevron has earned in the past, and anticipates that it will continue to earn under Act 257, a return on its investment in lessee-dealer stations in Hawaii that satisfies any constitutional standard.

The District Court granted summary judgment to Chevron, holding that "Act 257 fails to substantially advance a legitimate state interest, and as such, effects an unconstitutional taking in violation of the Fifth and Fourteenth Amendments." *Chevron U. S. A. Inc.* v. *Cayetano*, 57 F. Supp. 2d 1003, 1014 (1998). The District Court accepted Hawaii's argument that the rent cap was intended to prevent concentration of the retail gasoline market—and, more importantly, resultant high prices for consumers—by maintaining the viability of independent lessee-dealers. *Id.*, at 1009–1010. The court concluded that the statute would not substantially advance this interest, however, because it would not actually reduce lessee-dealers' costs or retail prices. It found that the rent cap would allow incumbent

lessee-dealers, upon transferring occupancy rights to a new lessee, to charge the incoming lessee a premium reflecting the value of the rent reduction. Accordingly, the District Court reasoned, the incoming lessee's overall expenses would be the same as in the absence of the rent cap, so there would be no savings to pass along to consumers. *Id.*, at 1010–1012. Nor would incumbent lessees benefit from the rent cap, the court found, because the oil company lessors would unilaterally raise wholesale fuel prices in order to offset the reduction in their rental income. *Id.*, at 1012–1014.

On appeal, a divided panel of the Court of Appeals for the Ninth Circuit held that the District Court had applied the correct legal standard to Chevron's takings claim. *Chevron U. S. A. Inc.* v. *Cayetano*, 224 F. 3d 1030, 1033–1037 (2000). The Court of Appeals vacated the grant of summary judgment, however, on the ground that a genuine issue of material fact remained as to whether the Act would benefit consumers. *Id.*, at 1037–1042. Judge William Fletcher concurred in the judgment, maintaining that the "reasonableness" standard applicable to "ordinary rent and price control laws" should instead govern Chevron's claim. *Id.*, at 1048.

On remand, the District Court entered judgment for Chevron after a 1-day bench trial in which Chevron and Hawaii called competing expert witnesses (both economists) to testify. 198 F. Supp. 2d 1182 (2002). Finding Chevron's expert witness to be "more persuasive" than the State's expert, the District Court once again concluded that oil companies would raise wholesale gasoline prices to offset any rent reduction required by Act 257, and that the result would be an increase in retail gasoline prices. *Id.*, at 1187–1189. Even if the rent cap did reduce lessee-dealers' costs, the court found, they would not pass on any savings to consumers. *Id.*, at 1189. The court went on to reiterate its determination that Act 257 would enable incumbent lessee-dealers to sell their leaseholds at a premium, such that incoming lessees would not

obtain any of the benefits of the rent cap. *Id.*, at 1189–1190. And while it acknowledged that the rent cap could preclude oil companies from constructively evicting dealers through excessive rents, the court found no evidence that Chevron or any other oil company would attempt to charge such rents in the absence of the cap. *Id.*, at 1191. Finally, the court concluded that Act 257 would in fact decrease the number of lessee-dealer stations because the rent cap would discourage oil companies from building such stations. *Id.*, at 1191–1192. Based on these findings, the District Court held that "Act 257 effect[ed] an unconstitutional regulatory taking given its failure to substantially advance any legitimate state interest." *Id.*, at 1193.

The Ninth Circuit affirmed, holding that its decision in the prior appeal barred Hawaii from challenging the application of the "substantially advances" test to Chevron's takings claim or from arguing for a more deferential standard of review. 363 F. 3d 846, 849–855 (2004). The panel majority went on to reject Hawaii's challenge to the application of the standard to the facts of the case. *Id.*, at 855–858. Judge Fletcher dissented, renewing his contention that Act 257 should not be reviewed under the "substantially advances" standard. *Id.*, at 859–861. We granted certiorari, 543 U. S. 924 (2004), and now reverse.

## II

### A

The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth, see *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226 (1897), provides that private property shall not "be taken for public use, without just compensation." As its text makes plain, the Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304, 314 (1987). In other

words, it "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Id.*, at 315 (emphasis in original). While scholars have offered various justifications for this regime, we have emphasized its role in "bar[ring] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960); see also *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 325 (1893).

The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property. See, *e. g.*, *United States* v. *Pewee Coal Co.*, 341 U. S. 114 (1951) (Government's seizure and operation of a coal mine to prevent a national strike of coal miners effected a taking); *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945) (Government's occupation of private warehouse effected a taking). Indeed, until the Court's watershed decision in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922), "it was generally thought that the Takings Clause reached *only* a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas* v. *South Carolina Coastal Council*, 505 U. S. 1003, 1014 (1992) (citations omitted and emphasis added; brackets in original); see also *id.*, at 1028, n. 15 ("[E]arly constitutional theorists did not believe the Takings Clause embraced regulations of property at all").

Beginning with *Mahon*, however, the Court recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such "regulatory takings" may be compensable under the Fifth Amendment. In Justice Holmes' storied but cryptic formulation, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U. S.,

at 415. The rub, of course, has been—and remains—how to discern how far is "too far." In answering that question, we must remain cognizant that "government regulation—by definition—involves the adjustment of rights for the public good," *Andrus* v. *Allard*, 444 U. S. 51, 65 (1979), and that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *Mahon*, *supra*, at 413.

Our precedents stake out two categories of regulatory action that generally will be deemed *per se* takings for Fifth Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U. S. 419 (1982) (state law requiring landlords to permit cable companies to install cable facilities in apartment buildings effected a taking). A second categorical rule applies to regulations that completely deprive an owner of "*all* economically beneficial us[e]" of her property. *Lucas*, 505 U. S., at 1019 (emphasis in original). We held in *Lucas* that the government must pay just compensation for such "total regulatory takings," except to the extent that "background principles of nuisance and property law" independently restrict the owner's intended use of the property. *Id.*, at 1026–1032.

Outside these two relatively narrow categories (and the special context of land-use exactions discussed below, see *infra*, at 546–548), regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104 (1978). The Court in *Penn Central* acknowledged that it had hitherto been "unable to develop any 'set formula'" for evaluating regulatory takings claims, but identified "several factors that have particular significance." *Id.*, at 124. Primary among those factors are "[t]he economic impact of the regulation on the

claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Ibid.* In addition, the "character of the governmental action"—for instance whether it amounts to a physical invasion or instead merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good"—may be relevant in discerning whether a taking has occurred. *Ibid.* The *Penn Central* factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules. See, *e. g.*, *Palazzolo* v. *Rhode Island*, 533 U. S. 606, 617–618 (2001); *id.*, at 632–634 (O'CONNOR, J., concurring).

Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries (reflected in *Loretto*, *Lucas*, and *Penn Central*) share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights. The Court has held that physical takings require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests. See *Dolan* v. *City of Tigard*, 512 U. S. 374, 384 (1994); *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825, 831–832 (1987); *Loretto*, *supra*, at 433; *Kaiser Aetna* v. *United States*, 444 U. S. 164, 176 (1979). In the *Lucas* context, of course, the complete elimination of a property's value is the determinative factor. See *Lucas*, *supra*, at 1017 (positing that "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physi-

cal appropriation"). And the *Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests.

B

In *Agins* v. *City of Tiburon*, a case involving a facial takings challenge to certain municipal zoning ordinances, the Court declared that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow* v. *Cambridge*, 277 U. S. 183, 188 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co.* v. *New York City*, 438 U. S. 104, 138, n. 36 (1978)." 447 U. S., at 260. Because this statement is phrased in the disjunctive, *Agins'* "substantially advances" language has been read to announce a stand-alone regulatory takings test that is wholly independent of *Penn Central* or any other test. Indeed, the lower courts in this case struck down Hawaii's rent control statute based solely upon their findings that it does not substantially advance a legitimate state interest. See *supra*, at 534, 536. Although a number of our takings precedents have recited the "substantially advances" formula minted in *Agins*, this is our first opportunity to consider its validity as a freestanding takings test. We conclude that this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence.

There is no question that the "substantially advances" formula was derived from due process, not takings, precedents. In support of this new language, *Agins* cited *Nectow* v. *Cambridge*, 277 U. S. 183, a 1928 case in which the plaintiff claimed that a city zoning ordinance "deprived him of his property without due process of law in contravention of the Fourteenth Amendment," *id.*, at 185. *Agins* then went on to discuss *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S.

365 (1926), a historic decision holding that a municipal zoning ordinance would survive a substantive due process challenge so long as it was not "clearly arbitrary and unreasonable, having no *substantial relation to the public health, safety, morals, or general welfare.*" *Id.*, at 395 (emphasis added); see also *Nectow, supra*, at 187–188 (quoting the same "substantial relation" language from *Euclid*).

When viewed in historical context, the Court's reliance on *Nectow* and *Euclid* is understandable. *Agins* was the Court's first case involving a challenge to zoning regulations in many decades, so it was natural to turn to these seminal zoning precedents for guidance. See Brief for United States as *Amicus Curiae* in *Agins* v. *City of Tiburon*, O. T. 1979, No. 79–602, pp. 12–13 (arguing that *Euclid* "set out the principles applicable to a determination of the facial validity of a zoning ordinance attacked as a violation of the Takings Clause of the Fifth Amendment"). Moreover, *Agins*' apparent commingling of due process and takings inquiries had some precedent in the Court's then-recent decision in *Penn Central*. See 438 U. S., at 127 (stating in dicta that "[i]t is . . . implicit in *Goldblatt* [v. *Hempstead*, 369 U. S. 590 (1962),] that a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose, see *Nectow* v. *Cambridge, supra*"). But see *Goldblatt* v. *Hempstead*, 369 U. S. 590, 594–595 (1962) (quoting "'reasonably necessary'" language from *Lawton* v. *Steele*, 152 U. S. 133, 137 (1894), a due process case, and applying a deferential "'reasonableness'" standard to determine whether a challenged regulation was a "valid exercise of the . . . police power" under the Due Process Clause). Finally, when *Agins* was decided, there had been some history of referring to deprivations of property without due process of law as "takings," see, *e. g.*, *Rowan* v. *Post Office Dept.*, 397 U. S. 728, 740 (1970), and the Court had yet to clarify whether "regulatory takings" claims were properly cognizable under the Takings Clause or the Due Process

Clause, see *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172, 197–199 (1985).

Although *Agins'* reliance on due process precedents is understandable, the language the Court selected was regrettably imprecise. The "substantially advances" formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause. See, *e. g.*, *County of Sacramento* v. *Lewis*, 523 U. S. 833, 846 (1998) (stating that the Due Process Clause is intended, in part, to protect the individual against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective"). But such a test is not a valid method of discerning whether private property has been "taken" for purposes of the Fifth Amendment.

In stark contrast to the three regulatory takings tests discussed above, the "substantially advances" inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property; it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause.

Chevron appeals to the general principle that the Takings Clause is meant "'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" Brief

for Respondent 17–21 (quoting *Armstrong*, 364 U. S., at 49). But that appeal is clearly misplaced, for the reasons just indicated. A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation. The owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation. It would make little sense to say that the second owner has suffered a taking while the first has not. Likewise, an ineffective regulation may not significantly burden property rights at all, and it may distribute any burden broadly and evenly among property owners. The notion that such a regulation nevertheless "takes" private property for public use merely by virtue of its ineffectiveness or foolishness is untenable.

Instead of addressing a challenged regulation's effect on private property, the "substantially advances" inquiry probes the regulation's underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property "*for public use.*" It does not bar government from interfering with property rights, but rather requires compensation "in the event of *otherwise proper interference* amounting to a taking." *First English Evangelical Lutheran Church*, 482 U. S., at 315 (emphasis added). Conversely, if a government action is found to be impermissible—for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.

Chevron's challenge to the Hawaii statute in this case illustrates the flaws in the "substantially advances" theory. To

begin with, it is unclear how significantly Hawaii's rent cap actually burdens Chevron's property rights. The parties stipulated below that the cap would reduce Chevron's aggregate rental income on 11 of its 64 lessee-dealer stations by about $207,000 per year, but that Chevron nevertheless expects to receive a return on its investment in these stations that satisfies any constitutional standard. See *supra*, at 534. Moreover, Chevron asserted below, and the District Court found, that Chevron would recoup any reductions in its rental income by raising wholesale gasoline prices. See *supra*, at 535. In short, Chevron has not clearly argued—let alone established—that it has been singled out to bear any particularly severe regulatory burden. Rather, the gravamen of Chevron's claim is simply that Hawaii's rent cap will not actually serve the State's legitimate interest in protecting consumers against high gasoline prices. Whatever the merits of that claim, it does not sound under the Takings Clause. Chevron plainly does not seek compensation for a taking of its property for a legitimate public use, but rather an injunction against the enforcement of a regulation that it alleges to be fundamentally arbitrary and irrational.

Finally, the "substantially advances" formula is not only *doctrinally* untenable as a takings test—its application as such would also present serious practical difficulties. The *Agins* formula can be read to demand heightened means-ends review of virtually any regulation of private property. If so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well suited. Moreover, it would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies.

Although the instant case is only the tip of the proverbial iceberg, it foreshadows the hazards of placing courts in this role. To resolve Chevron's takings claim, the District Court was required to choose between the views of two opposing

economists as to whether Hawaii's rent control statute would help to prevent concentration and supracompetitive prices in the State's retail gasoline market. Finding one expert to be "more persuasive" than the other, the court concluded that the Hawaii Legislature's chosen regulatory strategy would not actually achieve its objectives. See 198 F. Supp. 2d, at 1187–1193. The court determined that there was no evidence that oil companies had charged, or would charge, excessive rents. See *id.*, at 1191. Based on this and other findings, the District Court enjoined further enforcement of Act 257's rent cap provision against Chevron. We find the proceedings below remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation. See, *e. g.*, *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117, 124–125 (1978); *Ferguson* v. *Skrupa*, 372 U. S. 726, 730–732 (1963). The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here.

For the foregoing reasons, we conclude that the "substantially advances" formula announced in *Agins* is not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation. Since Chevron argued only a "substantially advances" theory in support of its takings claim, it was not entitled to summary judgment on that claim.

## III

We emphasize that our holding today—that the "substantially advances" formula is not a valid takings test—does not require us to disturb any of our prior holdings. To be sure, we applied a "substantially advances" inquiry in *Agins* itself, see 447 U. S., at 261–262 (finding that the challenged zoning ordinances "substantially advance[d] legitimate governmental goals"), and arguably also in *Keystone Bituminous Coal Assn.* v. *DeBenedictis*, 480 U. S. 470, 485–492 (1987) (quoting

"'substantially advance[s]'" language and then finding that the challenged statute was intended to further a substantial public interest). But in no case have we found a compensable taking based on such an inquiry. Indeed, in most of the cases reciting the "substantially advances" formula, the Court has merely assumed its validity when referring to it in dicta. See *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Regional Planning Agency*, 535 U. S. 302, 334 (2002); *Del Monte Dunes*, 526 U. S., at 704; *Lucas*, 505 U. S., at 1016; *Yee* v. *Escondido*, 503 U. S. 519, 534 (1992); *United States* v. *Riverside Bayview Homes, Inc.*, 474 U. S. 121, 126 (1985).

It might be argued that this formula played a role in our decisions in *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U. S. 374 (1994). See Brief for Respondent 21–23. But while the Court drew upon the language of *Agins* in these cases, it did not apply the "substantially advances" test that is the subject of today's decision. Both *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit. See *Dolan*, *supra*, at 379–380 (permit to expand a store and parking lot conditioned on the dedication of a portion of the relevant property for a "greenway," including a bike/pedestrian path); *Nollan*, *supra*, at 828 (permit to build a larger residence on beachfront property conditioned on dedication of an easement allowing the public to traverse a strip of the property between the owner's seawall and the mean high-tide line).

In each case, the Court began with the premise that, had the government simply appropriated the easement in question, this would have been a *per se* physical taking. *Dolan*, *supra*, at 384; *Nollan*, *supra*, at 831–832. The question was whether the government could, without paying the compensation that would otherwise be required upon effecting such

a taking, demand the easement as a condition for granting a development permit the government was entitled to deny. The Court in *Nollan* answered in the affirmative, provided that the exaction would substantially advance the same government interest that would furnish a valid ground for denial of the permit. 483 U. S., at 834–837. The Court further refined this requirement in *Dolan*, holding that an adjudicative exaction requiring dedication of private property must also be "'rough[ly] proportiona[l]' . . . both in nature and extent to the impact of the proposed development." 512 U. S., at 391; see also *Del Monte Dunes*, *supra*, at 702 (emphasizing that we have not extended this standard "beyond the special context of [such] exactions").

Although *Nollan* and *Dolan* quoted *Agins*' language, see *Dolan*, *supra*, at 385; *Nollan*, *supra*, at 834, the rule those decisions established is entirely distinct from the "substantially advances" test we address today. Whereas the "substantially advances" inquiry before us now is unconcerned with the degree or type of burden a regulation places upon property, *Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings. In neither case did the Court question whether the exaction would substantially advance *some* legitimate state interest. See *Dolan*, *supra*, at 387–388; *Nollan*, *supra*, at 841. Rather, the issue was whether the exactions substantially advanced the *same* interests that land-use authorities asserted would allow them to deny the permit altogether. As the Court explained in *Dolan*, these cases involve a special application of the "doctrine of 'unconstitutional conditions,'" which provides that "the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property." 512 U. S., at 385. That is worlds apart from a

rule that says a regulation affecting property constitutes a taking on its face solely because it does not substantially advance a legitimate government interest. In short, *Nollan* and *Dolan* cannot be characterized as applying the "substantially advances" test we address today, and our decision should not be read to disturb these precedents.

* * *

Twenty-five years ago, the Court posited that a regulation of private property "effects a taking if [it] does not substantially advance [a] legitimate state interes[t]." *Agins*, 447 U. S., at 260. The lower courts in this case took that statement to its logical conclusion, and in so doing, revealed its imprecision. Today we correct course. We hold that the "substantially advances" formula is not a valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence. In so doing, we reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories discussed above—by alleging a "physical" taking, a *Lucas*-type "total regulatory taking," a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*. Because Chevron argued only a "substantially advances" theory in support of its takings claim, it was not entitled to summary judgment on that claim. Accordingly, we reverse the judgment of the Ninth Circuit and remand the case for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE KENNEDY, concurring.

This separate writing is to note that today's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process. *Eastern Enterprises* v. *Apfel*, 524 U. S. 498, 539 (1998) (KENNEDY, J., concurring in judgment and dissenting in part). The failure

of a regulation to accomplish a stated or obvious objective would be relevant to that inquiry. Chevron voluntarily dismissed its due process claim without prejudice, however, and we have no occasion to consider whether Act 257 of the 1997 Hawaii Session Laws "represents one of the rare instances in which even such a permissive standard has been violated." *Apfel*, *supra*, at 550. With these observations, I join the opinion of the Court.

Syllabus

# JOHANNS, SECRETARY OF AGRICULTURE, ET AL. *v.* LIVESTOCK MARKETING ASSOCIATION ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 03–1164. Argued December 8, 2004—Decided May 23, 2005*

The Beef Promotion and Research Act of 1985 (Beef Act) establishes a federal policy of promoting and marketing beef and beef products. The Secretary of Agriculture has implemented the Beef Act through a Beef Promotion and Research Order (Order), which creates a Cattlemen's Beef Promotion and Research Board (Beef Board) and an Operating Committee, and imposes an assessment, or "checkoff," on all sales and importation of cattle. The assessment funds, among other things, beef promotional campaigns approved by the Operating Committee and the Secretary. Respondents, associations whose members pay the checkoff and individuals whose cattle are subject to the checkoff, challenged the program on First Amendment grounds, relying on *United States* v. *United Foods, Inc.*, 533 U. S. 405, in which this Court invalidated a mandatory checkoff that funded mushroom advertising. The District Court found that the Beef Act and Order unconstitutionally compel respondents to subsidize speech to which they object. Affirming, the Eighth Circuit held that compelled funding of speech may violate the First Amendment even when it is the government's speech.

*Held:* Because the beef checkoff funds the Government's own speech, it is not susceptible to a First Amendment compelled-subsidy challenge. Pp. 557–567.

(a) This Court has sustained First Amendment challenges in "compelled-subsidy" cases, in which the government requires an individual to subsidize a private message he disagrees with. See *Keller* v. *State Bar of Cal.*, 496 U. S. 1; *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209. *Keller* and *Abood* led the Court to sustain a compelled-subsidy challenge to an assessment whose only purpose was to fund mushroom advertising. *United Foods, supra*, at 413, 415–416. However, the speech in *United Foods*, *Keller*, and *Abood* was found, or presumed, to be private. The compelled-subsidy cases have consistently respected the principle that compelled support of private speech differs from compelled support of government speech. The Court has generally assumed, though not

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*Together with No. 03–1165, *Nebraska Cattlemen, Inc., et al.* v. *Livestock Marketing Association et al.*, also on certiorari to the same court.

Syllabus

squarely held, that such funding of government speech does not alone raise First Amendment concerns. Pp. 557–559.

(b) Respondents argue that the speech here is not government speech because it is controlled by nongovernmental entities, *i. e.*, the Beef Board and Operating Committee. In fact, the message is effectively controlled by the Federal Government. Congress and the Secretary have set out the overarching message and some of the campaign's elements, and have left the development of the remaining details to the Operating Committee, half of whose members are appointed by the Secretary and all of whom are subject to removal by the Secretary. The Secretary also has final approval authority over every word in every promotional campaign, and his subordinates attend and participate in meetings at which proposals are developed. By contrast, in *Keller* the compelled-subsidy-funded communicative activities that were not prescribed by law or developed under official government supervision. Nor does the Order's funding mechanism affect the compelled-subsidy analysis. That citizens have no First Amendment right not to fund government speech is no less true when, as here, the funding is achieved through targeted assessments devoted to a program to which some assessed citizens object, rather than through general taxes. The Court need not address respondents' argument that the advertisements, most of which are credited to "America's Beef Producers," give the impression that respondents endorse their message. Neither the Beef Act nor the Order requires attribution of the ads to "America's Beef Producers" or to anyone else, so neither can be facially invalid on this theory, and the record contains no evidence from which to conclude that the ads' message would be associated with respondents. Pp. 560–567.

(c) Respondents may proceed with their other challenges to the Beef Act and Order, which the District Court did not reach. P. 567.

335 F. 3d 711, vacated and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, THOMAS, and BREYER, JJ., joined. THOMAS, J., *post*, p. 567, and BREYER, J., *post*, p. 569, filed concurring opinions. GINSBURG, J., filed an opinion concurring in the judgment, *post*, p. 569. KENNEDY, J., filed a dissenting opinion, *post*, p. 570. SOUTER, J., filed a dissenting opinion, in which STEVENS and KENNEDY, JJ., joined, *post*, p. 570.

*Deputy Solicitor General Kneedler* argued the cause for the federal petitioners in No. 03–1164. With him on the briefs in both cases were *Acting Solicitor General Clement*,

Counsel

*Assistant Attorney General Keisler, Irving L. Gornstein, Douglas N. Letter,* and *Matthew M. Collette.*

*Gregory G. Garre* argued the cause for petitioners in No. 03–1165. With him on the briefs was *Lorane F. Hebert.*

*Laurence H. Tribe* argued the cause for respondents in both cases. With him on the brief were *Thomas Goldstein, Amy Howe, Philip Olsson, Ronald A. Parsons, Jr.,* and *Scott N. Heidepriem.*†

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†Briefs of *amici curiae* urging reversal in both cases were filed for the State of California by *Bill Lockyer,* Attorney General of California, *Richard M. Frank,* Chief Deputy Attorney General, *Mary E. Hackenbracht,* Senior Assistant Attorney General, and *Linda L. Berg,* Deputy Attorney General; for the State of Texas et al. by *Greg Abbott,* Attorney General of Texas, *R. Ted Cruz,* Solicitor General, *Rance L. Craft,* Assistant Solicitor General, *Barry R. McBee,* First Assistant Attorney General, and *Edward D. Burbach,* Deputy Attorney General, by *William Vázquez Irizarry,* Secretary of Justice of Puerto Rico, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *Terry Goddard* of Arizona, *Mike Beebe* of Arkansas, *Ken Salazar* of Colorado, *M. Jane Brady* of Delaware, *Charles J. Crist, Jr.,* of Florida, *Thurbert E. Baker* of Georgia, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Thomas J. Miller* of Iowa, *Gregory D. Stumbo* of Kentucky, *Charles C. Foti, Jr.,* of Louisiana, *J. Joseph Curran, Jr.,* of Maryland, *Michael A. Cox* of Michigan, *Jim Hood* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Jon Bruning* of Nebraska, *Patricia A. Madrid* of New Mexico, *Wayne Stenehjem* of North Dakota, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Gerald J. Pappert* of Pennsylvania, *Henry McMaster* of South Carolina, *Paul G. Summers* of Tennessee, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Jerry W. Kilgore* of Virginia, *Christine O. Gregoire* of Washington, *Peggy A. Lautenschlager* of Wisconsin, and *Patrick J. Crank* of Wyoming; for the American Cotton Shippers Association et al. by *Walter Dellinger* and *Pamela Harris;* for the California Agricultural Issues Forum by *Seth P. Waxman, Randolph D. Moss, Todd Zubler,* and *Brian M. Boynton;* for the Michigan Pork Producers Association, Inc., et al. by *Edward M. Mansfield;* for Thad Cochran et al. by *David A. Bono* and *Gerald P. Norton;* and for 113 Agricultural Industry Associations by *Charles L. Babcock* and *David T. Moran.*

Briefs of *amici curiae* urging affirmance in both cases were filed for the Campaign for Family Farms et al. by *Susan E. Stokes, David R. Moeller,*

JUSTICE SCALIA delivered the opinion of the Court.

For the third time in eight years, we consider whether a federal program that finances generic advertising to promote an agricultural product violates the First Amendment. In these cases, unlike the previous two, the dispositive question is whether the generic advertising at issue is the Government's own speech and therefore is exempt from First Amendment scrutiny.

## I

### A

The Beef Promotion and Research Act of 1985 (Beef Act or Act), 99 Stat. 1597, announces a federal policy of promoting the marketing and consumption of "beef and beef products," using funds raised by an assessment on cattle sales and importation. 7 U. S. C. § 2901(b). The statute directs the Secretary of Agriculture to implement this policy by issuing a Beef Promotion and Research Order (Beef Order or Order), § 2903, and specifies four key terms it must contain: The Secretary is to appoint a Cattlemen's Beef Promotion and Research Board (Beef Board or Board), whose members are to be a geographically representative group of beef producers and importers, nominated by trade associations. § 2904(1). The Beef Board is to convene an Operating Committee, composed of 10 Beef Board members and 10 repre-

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and *Karen R. Krub;* for the Coalition of Cotton Apparel Importers by *Carter G. Phillips, Alan Charles Raul, Eric A. Shumsky,* and *Michael C. Soules;* for the DKT Liberty Project et al. by *Julie M. Carpenter, Daniel Mach,* and *Robert M. O'Neil;* for Public Citizen, Inc., by *Scott L. Nelson;* for Rose Acre Farms, Inc., by *Corinne R. Finnerty* and *Loren D. Reuter;* for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp;* for Jeanne Charter et al. by *Erik S. Jaffe, Brian C. Leighton, James A. Moody, Steven B. Gold, Renee Giachino, Michael P. McMahon,* and *Virginia B. Townes;* and for Joseph Cochran et al. by *William H. Mellor, Steven M. Simpson,* and *Scott G. Bullock.*

*Barry Richard, Hank B. Campbell,* and *Monterey Campbell* filed a brief in both cases for the State of Florida, Department of Citrus, as *amicus curiae.*

sentatives named by a federation of state beef councils. § 2904(4)(A). The Secretary is to impose a $1-per-head assessment (or "checkoff") on all sales or importation of cattle and a comparable assessment on imported beef products. § 2904(8). And the assessment is to be used to fund beef-related projects, including promotional campaigns, designed by the Operating Committee and approved by the Secretary. §§ 2904(4)(B), (C).

The Secretary promulgated the Beef Order with the specified terms. The assessment is collected primarily by state beef councils, which then forward the proceeds to the Beef Board. 7 CFR § 1260.172(a)(5) (2004).[1] The Operating Committee proposes projects to be funded by the checkoff including promotion and research. § 1260.167(a). The Secretary or his designee (see §§ 2.22(a)(1)(viii)(X), 2.79(a)(8)(xxxii)) approves each project and, in the case of promotional materials, the content of each communication. §§ 1260.168(e), 1260.169; App. 114, 143.

The Beef Order was promulgated in 1986 on a temporary basis, subject to a referendum among beef producers on whether to make it permanent. 7 U. S. C. §§ 2903, 2906(a). In May 1988, a large majority voted to continue it. Since that time, more than $1 billion has been collected through the checkoff, 132 F. Supp. 2d 817, 820 (SD 2001), and a large fraction of that sum has been spent on promotional projects authorized by the Beef Act—many using the familiar trademarked slogan "Beef. It's What's for Dinner." App. 50. In fiscal year 2000, for example, the Beef Board collected over $48 million in assessments and spent over $29 million on domestic promotion. The Board also funds overseas marketing efforts; market and food-science research, such as evaluations of the nutritional value of beef; and informa-

[1] In most cases, only 50 cents per head is remitted to the Beef Board, because the Beef Act and Beef Order allow domestic producers to deduct from their $1 assessment up to 50 cents in voluntary contributions to their state beef councils. 7 U. S. C. § 2904(8)(C); 7 CFR § 1260.172(a)(3) (2004).

tional campaigns for both consumers and beef producers. See 7 U. S. C. §§ 2902(6), (9), (15), 2904(4)(B).

Many promotional messages funded by the checkoff (though not all, see App. 52–53) bear the attribution "Funded by America's Beef Producers." *E. g., id.*, at 50–51. Most print and television messages also bear a Beef Board logo, usually a checkmark with the word "BEEF." *E. g., id.*, at 50–52.

B

Respondents are two associations whose members collect and pay the checkoff, and several individuals who raise and sell cattle subject to the checkoff. *Id.*, at 17–19. They sued the Secretary, the Department of Agriculture, and the Board in Federal District Court on a number of constitutional and statutory grounds not before us—in particular, that the Board impermissibly used checkoff funds to send communications supportive of the beef program to beef producers. 132 F. Supp. 2d, at 823. Petitioners in No. 03–1165, a state beef producers' association and two individual producers, intervened as defendants to argue in support of the program. The District Court granted a limited preliminary injunction, which forbade the continued use of checkoff funds to laud the beef program or to lobby for governmental action relating to the checkoff. *Id.*, at 832.

While the litigation was pending, we held in *United States* v. *United Foods, Inc.*, 533 U. S. 405 (2001), that a mandatory checkoff for generic mushroom advertising violated the First Amendment. Noting that the mushroom program closely resembles the beef program,[2] respondents amended their

[2] The Department of Agriculture oversees similar programs of promotional advertising, funded by checkoffs, for a number of other agricultural commodities. See 7 CFR § 1205.10 *et seq.* (2004) (cotton); § 1207.301 *et seq.* (potatoes); § 1210.301 *et seq.* (watermelons); § 1215.1 *et seq.* (popcorn); § 1216.1 *et seq.* (peanuts); § 1218.1 *et seq.* (blueberries); § 1219.1 *et seq.* (Hass avocados); § 1220.101 *et seq.* (soybeans); § 1230.1 *et seq.* (pork); § 1240.1 *et seq.* (honey); § 1250.301 *et seq.* (eggs); § 1280.101 *et seq.* (lamb).

complaint to assert a First Amendment challenge to the use of the beef checkoff for promotional activity. 207 F. Supp. 2d 992, 996 (SD 2002); App. 30–32. Respondents noted that the advertising promotes beef as a generic commodity, which, they contended, impedes their efforts to promote the superiority of, *inter alia*, American beef, grain-fed beef, or certified Angus or Hereford beef.

After a bench trial, the District Court ruled for respondents on their First Amendment claim. It declared that the Beef Act and Beef Order unconstitutionally compel respondents to subsidize speech to which they object, and rejected the Government's contention that the checkoff survives First Amendment scrutiny because it funds only government speech. 207 F. Supp. 2d, at 1002–1007. The court entered a permanent injunction barring any further collection of the beef checkoff, even from producers willing to pay (allowing continued collection of voluntary checkoffs, the court thought, would require "rewrit[ing]" the Beef Act). *Id.*, at 1007–1008. Believing that the cost of calculating the share of the checkoff attributable to the compelled subsidy would be too great, the court also declined to order a refund of checkoff funds already collected. *Ibid.* Finally, the court made permanent its earlier injunction against "producer communications" praising the beef program or seeking to influence governmental policy. *Id.*, at 1008. The court did not rule on respondents' other claims, but certified its resolution of the First Amendment claim as final pursuant to Federal Rule of Civil Procedure 54(b). 207 F. Supp. 2d, at 1008.

The Court of Appeals for the Eighth Circuit affirmed. 335 F. 3d 711 (2003). Unlike the District Court, the Court of Appeals did not dispute that the challenged advertising is government speech; instead, it held that government speech status is relevant only to First Amendment challenges to the speech's *content*, not to challenges to its compelled *funding*. See *id.*, at 720–721. Compelled funding of speech, it held,

may violate the First Amendment even if the speech in question is the government's. *Ibid.*

We granted certiorari. 541 U. S. 1062 (2004).

## II

We have sustained First Amendment challenges to allegedly compelled expression in two categories of cases: true "compelled-speech" cases, in which an individual is obliged personally to express a message he disagrees with, imposed by the government; and "compelled-subsidy" cases, in which an individual is required by the government to subsidize a message he disagrees with, expressed by a private entity. We have not heretofore considered the First Amendment consequences of government-compelled subsidy of the government's own speech.

We first invalidated an outright compulsion of speech in *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943). The State required every schoolchild to recite the Pledge of Allegiance while saluting the American flag, on pain of expulsion from the public schools. We held that the First Amendment does not "le[ave] it open to public authorities to compel [a person] to utter" a message with which he does not agree. *Id.*, at 634. Likewise, in *Wooley* v. *Maynard*, 430 U. S. 705 (1977), we held that requiring a New Hampshire couple to bear the State's motto, "Live Free or Die," on their cars' license plates was an impermissible compulsion of expression. Obliging people to "use their private property as a 'mobile billboard' for the State's ideological message" amounted to impermissible compelled expression. *Id.*, at 715.

The reasoning of these compelled-speech cases has been carried over to certain instances in which individuals are compelled not to speak, but to subsidize a private message with which they disagree. Thus, although we have upheld state-imposed requirements that lawyers be members of the state bar and pay its annual dues, and that public school

teachers either join the labor union representing their "shop" or pay "service fees" equal to the union dues, we have invalidated the use of the compulsory fees to fund speech on political matters. See *Keller* v. *State Bar of Cal.*, 496 U. S. 1 (1990); *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977). Bar or union speech with such content, we held, was not germane to the regulatory interests that justified compelled membership, and accordingly, making those who disagreed with it pay for it violated the First Amendment. See *Keller, supra*, at 15–16; *Abood, supra*, at 234–235.

These latter cases led us to sustain a compelled-subsidy challenge to an assessment very similar to the beef checkoff, imposed to fund mushroom advertising. *United Foods, supra;* see 335 F. 3d, at 717 ("[W]e agree with the district court that '[t]he beef checkoff is, in all material respects, identical to the mushroom checkoff'" at issue in *United Foods*). Deciding the case on the assumption that the advertising was private speech, not government speech, see 533 U. S., at 416–417,[3] we concluded that *Abood* and *Keller* were controlling. As in those cases, mushroom producers were obliged by "law or necessity" to pay the checkoff; although *Abood* and *Keller* would permit the mandatory fee if it were "germane" to a "broader regulatory scheme," in

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[3] In *United Foods*, the Court distinguished (and the dissent relied on) *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U. S. 457 (1997), which upheld the use of mandatory assessments to fund generic advertising promoting California tree fruit. In *Glickman*, as in *United Foods*, the Government did not argue that the advertising was permissible government speech. See 521 U. S., at 482, n. 2 (SOUTER, J., dissenting) (noting that the Government had waived any such argument). Rather, the Government contended, and we agreed, that compelled support for generic advertising was legitimately part of the Government's "collectivist" centralization of the market for tree fruit. *Id.*, at 475 (opinion of the Court). Here, as in *United Foods*, "there is no broader regulatory system in place" that collectivizes aspects of the beef market unrelated to speech, so *Glickman* is not controlling. 533 U. S., at 415.

*United Foods* the only regulatory purpose was the funding of the advertising. 533 U. S., at 413, 415–416.

In all of the cases invalidating exactions to subsidize speech, the speech was, or was presumed to be, that of an entity other than the government itself. See *Keller, supra,* at 11, 15–16; *Abood, supra,* at 212–213; *United Foods, supra,* at 416–417; see also *Board of Regents of Univ. of Wis. System* v. *Southworth,* 529 U. S. 217, 229, 230 (2000) (because "[t]he University ha[s] disclaimed that the speech is its own," *Abood* and *Keller* "provide the beginning point for our analysis"); cf. *Rosenberger* v. *Rector and Visitors of Univ. of Va.,* 515 U. S. 819, 851–852 (1995) (O'CONNOR, J., concurring) (university's Student Activities Fund likely does not unconstitutionally compel speech because it "represents not government resources . . . but a fund that simply belongs to the students"). Our compelled-subsidy cases have consistently respected the principle that "[c]ompelled support of a private association is fundamentally different from compelled support of government." *Abood, supra,* at 259, n. 13 (Powell, J., concurring in judgment). "Compelled support of government"—even those programs of government one does not approve—is of course perfectly constitutional, as every taxpayer must attest. And some government programs involve, or entirely consist of, advocating a position. "The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies." *Southworth,* 529 U. S., at 229. We have generally assumed, though not yet squarely held, that compelled funding of government speech does not alone raise First Amendment concerns. See *ibid.; Keller, supra,* at 12–13; *Rosenberger, supra,* at 833; see also *Wooley, supra,* at 721 (REHNQUIST, J., dissenting).

III

Respondents do not seriously dispute these principles, nor do they contend that, as a general matter, their First Amendment challenge requires them to show only that their checkoff dollars pay for speech with which they disagree. Rather, they assert that the challenged promotional campaigns differ dispositively from the type of government speech that, our cases suggest, is not susceptible to First Amendment challenge. They point to the role of the Beef Board and its Operating Committee in designing the promotional campaigns, and to the use of a mandatory assessment on beef producers to fund the advertising. We consider each in turn.

A

The Secretary of Agriculture does not write ad copy himself. Rather, the Beef Board's promotional campaigns are designed by the Beef Board's Operating Committee, only half of whose members are Beef Board members appointed by the Secretary. (All members of the Operating Committee are subject to *removal* by the Secretary. 7 CFR § 1260.213 (2004).) Respondents contend that speech whose content is effectively controlled by a nongovernmental entity—the Operating Committee—cannot be considered "government speech." We need not address this contention, because we reject its premise: The message of the promotional campaigns is effectively controlled by the Federal Government itself.[4]

The message set out in the beef promotions is from beginning to end the message established by the Federal Gov-

[4] We therefore need not label the Operating Committee as "governmental" or "nongovernmental." The entity to which assessments are remitted is the Beef Board, all of whose members are appointed by the Secretary pursuant to law. The Operating Committee's only relevant involvement is ancillary—it designs the promotional campaigns, which the Secretary supervises and approves—and its status as a state actor thus is not directly at issue.

ernment.[5] Congress has directed the implementation of a "coordinated program" of promotion, "including paid advertising, to advance the image and desirability of beef and beef products." 7 U. S. C. §§ 2901(b), 2902(13). Congress and the Secretary have also specified, in general terms, what the promotional campaigns shall contain, see, *e. g.*, § 2904(4)(B)(i) (campaigns "shall . . . take into account" different types of beef products), and what they shall not, see, *e. g.*, 7 CFR § 1260.169(d) (2004) (campaigns shall not, without prior approval, refer "to a brand or trade name of any beef product"). Thus, Congress and the Secretary have set out the overarching message and some of its elements, and they have left the development of the remaining details to an entity whose members are answerable to the Secretary (and in some cases appointed by him as well).

Moreover, the record demonstrates that the Secretary exercises final approval authority over every word used in every promotional campaign. All proposed promotional messages are reviewed by Department officials both for substance and for wording, and some proposals are rejected or rewritten by the Department. App. 114, 118–121, 274–275. Nor is the Secretary's role limited to final approval or rejection: Officials of the Department also attend and participate in the open meetings at which proposals are developed. *Id.*, at 111–112.

This degree of governmental control over the message funded by the checkoff distinguishes these cases from *Keller*.

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[5] The principal dissent suggests that if this is so, then the Government has adopted at best a mixed message, because it also promulgates dietary guidelines that, if followed, would discourage excessive consumption of beef. *Post*, at 577, n. 5 (opinion of SOUTER, J.); see also *post*, at 569–570 (GINSBURG, J., concurring in judgment). Even if we agreed that the protection of the government-speech doctrine must be forfeited whenever there is inconsistency in the message, we would nonetheless accord the protection here. The beef promotions are perfectly compatible with the guidelines' message of moderate consumption—the ads do not insist that beef is also What's for Breakfast, Lunch, and Midnight Snack.

There the state bar's communicative activities to which the plaintiffs objected were not prescribed by law in their general outline and not developed under official government supervision. Indeed, many of them consisted of lobbying the state legislature on various issues. See 496 U. S., at 5, and n. 2. When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.

B

Respondents also contend that the beef program does not qualify as "government speech" because it is funded by a targeted assessment on beef producers, rather than by general revenues. This funding mechanism, they argue, has two relevant effects: It gives control over the beef program not to politically accountable legislators, but to a narrow interest group that will pay no heed to respondents' dissenting views, and it creates the perception that the advertisements speak for beef producers such as respondents.

We reject the first point. The compelled-*subsidy* analysis is altogether unaffected by whether the funds for the promotions are raised by general taxes or through a targeted assessment. Citizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object. Cf. *United States* v. *Lee*, 455 U. S. 252, 260 (1982) ("There is no principled way . . . to distinguish between general taxes and those imposed under the Social Security Act" in evaluating the burden on the right to free exercise of religion). The First Amendment does not confer a right to pay one's taxes

into the general fund, because the injury of compelled funding (as opposed to the injury of compelled speech) does not stem from the Government's mode of accounting. Cf. *Bowen* v. *Roy*, 476 U. S. 693, 700 (1986) ("The Free Exercise Clause . . . does not afford an individual a right to dictate the conduct of the Government's internal procedures"); *id.*, at 716–717 (STEVENS, J., concurring in part and concurring in result).

Some of our cases have justified compelled funding of government speech by pointing out that government speech is subject to democratic accountability. See, *e. g.*, *Abood*, 431 U. S., at 259, n. 13 (Powell, J., concurring in judgment); *Southworth*, 529 U. S., at 235. But our references to "traditional political controls," *id.*, at 229, do not signify that the First Amendment duplicates the Appropriations Clause, U. S. Const., Art. I, § 9, cl. 7, or that every instance of government speech must be funded by a line item in an appropriations bill. Here, the beef advertisements are subject to political safeguards more than adequate to set them apart from private messages. The program is authorized and the basic message prescribed by federal statute, and specific requirements for the promotions' content are imposed by federal regulations promulgated after notice and comment. The Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements' content, right down to the wording.[6] And Congress, of course, retains oversight authority, not to mention

[6] Congress also required a referendum among producers before permanently implementing the checkoff, and allowed the Secretary to call another referendum upon demand of a "representative group" comprising 10 percent of cattle producers. 7 U. S. C. §§ 2906(a)–(b). Even before they amended their complaint to challenge the checkoff as compelled speech, respondents were seeking in this litigation to force such a referendum. See 207 F. Supp. 2d 992, 995 (SD 2002).

the ability to reform the program at any time. No more is required.[7]

As to the second point, respondents' argument proceeds as follows: They contend that crediting the advertising to "America's Beef Producers" impermissibly uses not only their money but also their seeming endorsement to promote a message with which they do not agree. Communications cannot be "government speech," they argue, if they are attributed to someone other than the government; and the person to whom they are attributed, when he is, by compulsory funding, made the unwilling instrument of communication, may raise a First Amendment objection.

We need not determine the validity of this argument—which relates to compelled *speech* rather than compelled

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[7] The principal dissent finds some "First Amendment affront" in all compelled funding of government speech—and when, it says, "a targeted assessment . . . makes the First Amendment affront more galling, . . . greater care is required to ensure that the political process can practically respond to limit the compulsion." *Post*, at 576. That greater care consists, the dissent says, of a requirement that government speech funded by a targeted assessment must identify government as the speaker. *Post*, at 576–578. The dissent cites no prior practice, no precedent, and no authority for this highly refined elaboration—not even anyone who has ever before thought of it. It is more than we think can be found within "Congress shall make no law . . . abridging the freedom of speech." Of course, nothing in the Beef Act or Beef Order prevents the Government from identifying itself as sponsor of the ads—much less requires *concealment* of the ads' provenance—so even if it were correct, this theory would not sustain the judgment below, which altogether enjoined the Act and the Order. But the correct focus is not on whether the ads' audience realizes the Government is speaking, but on the compelled assessment's purported interference with respondents' First Amendment rights. As we hold today, respondents enjoy no right not to fund government speech—whether by broad-based taxes or targeted assessments, and whether or not the reasonable viewer would identify the speech as the government's. If a viewer would identify the speech as *respondents'*, however, the analysis would be different. See *infra* this page and 565–567, and n. 8.

*subsidy*[8]—with regard to respondents' facial challenge. Since neither the Beef Act nor the Beef Order *requires* attribution, neither can be the cause of any possible First Amendment harm. The District Court's order enjoining the enforcement of the Act and the Order thus cannot be sustained on this theory.

On some set of facts, this second theory might (again, we express no view on the point) form the basis for an as-applied challenge—if it were established, that is, that individual beef advertisements were attributed to respondents. The record, however, includes only a stipulated sampling of these promotional materials, see App. 47, and none of the exemplars provides any support for this attribution theory except for the tagline identifying the funding. Respondents apparently presented no other evidence of attribution at trial, and the District Court made no factual findings on the point. Indeed, in the only trial testimony on the subject that any party has identified, an employee of one of the respondent associations said he did *not* think the beef promotions would

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[8]The principal dissent conflates the two concepts into something it describes as citizens' "presumptive autonomy as speakers to decide what to say and what to pay for others to say." *Post*, at 576. As we discuss in the text, there might be a valid objection if "those singled out to pay the tax are closely linked with the expression" (*post*, at 575–576) in a way that makes them appear to endorse the government message. But this compelled-speech argument (like the *Wooley* and *Barnette* opinions on which it draws) differs substantively from the compelled-subsidy analysis. The latter invalidates an exaction not because being forced to pay for speech that is unattributed violates personal autonomy, but because being forced to fund someone else's private speech unconnected to any legitimate government purpose violates personal autonomy. *Supra*, at 557–558 (discussing *Keller* and *Abood*). Such a violation does not occur when the exaction funds government speech. Apportioning the burden of funding government operations (including speech) through taxes and other levies does not violate autonomy simply because individual taxpayers feel "singled out" or find the exaction "galling," *post*, at 575–576, and n. 4.

be attributed to his group.[9] Whether the *individual* respondents who are beef producers would be associated with speech labeled as coming from "America's Beef Producers" is a question on which the trial record is altogether silent. We have only the funding tagline itself, a trademarked term[10] that, standing alone, is not sufficiently specific to convince a reasonable factfinder that any particular beef producer, or all beef producers, would be tarred with the content of each trademarked ad.[11] We therefore conclude that

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[9] An employee of respondent Western Organization of Resource Councils (WORC) testified as follows:

"Q When someone would see an ad that says, 'Beef, it's what's for dinner,' do you believe anyone looks at that ad and says that message is coming from WORC?

"A I don't think so.

"Q . . . [D]o you have any basis to actually believe that any of these messages promoted by the Cattlemen's Beef Board are attributed to WORC as an organization?

. . . . .

"A No, I don't think so." Tr. 46–47 (Jan. 14, 2002).

[10] The phrase "America's Beef Producers" has apparently been trademarked by the Board since 1999, see http://tarr.uspto.gov/servlet/tarr?regser=registration&entry=2352917 (as visited May 20, 2005, and available in Clerk of Court's case file), and some promotional materials are attributed to "America's Beef Producers[SM]." Other promotional materials in the record, however, bear other attributions (such as a notice identifying the Beef Board as the copyright holder, or the apparently untrademarked phrase "Funded by America's Veal Producers through the Beef Checkoff"). App. 52.

[11] "America's Beef Producers" might be thought more plausibly to refer to a particular organization of beef producers, and such an organization might have a valid First Amendment objection if the ads' message were incorrectly attributed to it. Cf. *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 572–573 (1995). But neither of the respondent groups claims that it would be mistaken for "America's Beef Producers," see n. 9, *supra*, and none of the individual respondents claims to be injured because of his membership in an organization. Rather, respondents claim that "America's Beef Producers" is precise enough to identify the speech as coming from Robert Thullner, John Smith, Ernie Mertz, and the other respondents who are American beef producers.

on the record before us an as-applied First Amendment challenge to the individual advertisements affords no basis on which to sustain the Eighth Circuit's judgment, even in part.

* * *

Respondents' complaint asserted a number of other grounds for declaring the Beef Act, the Beef Order, or both invalid in their entirety. The District Court, having enjoined the Act and the Order on the basis of the First Amendment, had no occasion to address these other grounds. Respondents may now proceed on these other claims.

The judgment of the Court of Appeals is vacated, and the cases are remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE THOMAS, concurring.

I join the Court's opinion. I continue to believe that "[a]ny regulation that compels the funding of advertising must be subjected to the most stringent First Amendment scrutiny." *United States* v. *United Foods, Inc.*, 533 U. S. 405, 419 (2001) (THOMAS, J., concurring); see also *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U. S. 457, 504–506 (1997) (THOMAS, J., dissenting). At the same time, I recognize that this principle must be qualified where the regulation compels the funding of speech that is the government's own. It cannot be that all taxpayers have a First Amendment objection to taxpayer-funded government speech, even if the funded speech is not "germane" to some broader regulatory program. See *ante*, at 557–559. Like the Court, I see no analytical distinction between "pure" government speech funded from general tax revenues and speech funded from targeted exactions, *ante*, at 562–564; the practice of using targeted taxes to fund government operations, such as excise taxes, dates from the founding, see The Federalist No. 12, p. 75 (J. Cooke ed. 1961).

Still, if the advertisements associated their generic pro-beef message with either the individual or organization respondents, then respondents would have a valid as-applied First Amendment challenge. The government may not, consistent with the First Amendment, associate individuals or organizations involuntarily with speech by attributing an unwanted message to them, whether or not those individuals fund the speech, and whether or not the message is under the government's control. This principle follows not only from our cases establishing that the government may not compel individuals to convey messages with which they disagree, see, *e. g.*, *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 633–634 (1943); *Wooley* v. *Maynard*, 430 U. S. 705, 713–717 (1977), but also from our expressive-association cases, which prohibit the government from coercively associating individuals or groups with unwanted messages, see, *e. g.*, *Boy Scouts of America* v. *Dale*, 530 U. S. 640, 653 (2000) (government cannot "force [an] organization to send a message" with which it disagrees); *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 576–577 (1995). If West Virginia had compelled Mr. Barnette to take out an advertisement reciting the Pledge of Allegiance and purporting to be "A Message from the Barnette Children," for example, that would have been compelled speech (if a less intrusive form of it), just like the mandatory flag salute invalidated in *Barnette*. The present record, however, does not show that the advertisements objectively associate their message with any individual respondent. *Ante*, at 564–567, and n. 11.* The targeted nature of the funding is also too attenuated a link.

Moreover, these are not cases like *Barnette;* the Government has not forced respondents to bear a government-imposed message. Cf. *ante*, at 565, n. 8; *post*, at 579, n. 9 (SOUTER, J., dissenting). The payment of taxes to the gov-

*I note that on remand respondents may be able to amend their complaint to assert an attribution claim. See Fed. Rule Civ. Proc. 15.

ernment for purposes of supporting government speech is not nearly as intrusive as being forced to "utter what is not in [one's] mind," *Barnette*, *supra*, at 634, or to carry an unwanted message on one's property.

With these observations, I join the Court's opinion.

JUSTICE BREYER, concurring.

The beef checkoff program in these cases is virtually identical to the mushroom checkoff program in *United States* v. *United Foods, Inc.*, 533 U. S. 405 (2001), which the Court struck down on First Amendment grounds. The "government speech" theory the Court adopts today was not before us in *United Foods*, and we declined to consider it when it was raised at the eleventh hour. See *id.*, at 416–417. I dissented in *United Foods*, based on my view that the challenged assessments involved a form of economic regulation, not speech. See *id.*, at 428. And I explained that, were I to classify the program as involving "commercial speech," I would still vote to uphold it. See *id.*, at 429.

I remain of the view that the assessments in these cases are best described as a form of economic regulation. However, I recognize that a majority of the Court does not share that view. Now that we have had an opportunity to consider the "government speech" theory, I accept it as a solution to the problem presented by these cases. With the caveat that I continue to believe that my dissent in *United Foods* offers a preferable approach, I join the Court's opinion.

JUSTICE GINSBURG, concurring in the judgment.

I resist ranking the promotional messages funded under the Beef Promotion and Research Act of 1985, 7 U. S. C. § 2901 *et seq.*, but not attributed to the Government, as government speech, given the message the Government conveys in its own name. See, *e. g.*, U. S. Dept. of Health and Human Services and U. S. Dept. of Agriculture, Dietary Guidelines

for Americans 2005, pp. 69, 30, available at http://www.health.gov/dietaryguidelines/dga2005/document/ (as visited May 18, 2005, and available in Clerk of Court's case file) (noting that "*[t]rans* fatty acids . . . are present in foods that come from ruminant animals (*e. g.*, cattle and sheep)" and recommending that Americans "[l]imit intake of fats and oils high in saturated and/or *trans* fatty acids"); *post*, at 578, n. 7 (SOUTER, J., dissenting). I remain persuaded, however, that the assessments in these cases, as in *United States* v. *United Foods, Inc.*, 533 U. S. 405 (2001), and *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U. S. 457 (1997), qualify as permissible economic regulation. See *United Foods*, 533 U. S., at 425 (BREYER, J., dissenting). For that reason, I concur in the judgment.

JUSTICE KENNEDY, dissenting.

I join JUSTICE SOUTER's dissenting opinion, which demonstrates with persuasive analysis why the speech at issue here cannot meaningfully be considered government speech at all. I would reserve for another day the difficult First Amendment questions that would arise if the government were to target a discrete group of citizens to pay even for speech that the government does "embrace as publicly as it speaks," *post*, at 580.

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE KENNEDY join, dissenting.

The Beef Promotion and Research Act of 1985, known as the Beef Act, taxes cattle sold in or imported into the United States at one dollar a head. 7 U. S. C. § 2904(8). Much of the revenue is spent urging people to eat beef, as in advertisements with the slogan, "Beef. It's What's for Dinner." App. 50. Respondent taxpayers, "South Dakota and Montana ranchers and organizations representing their interests," Brief for Respondents 1, object to the tax because they disagree with the advertisements' content, which they see as

a generic message that "beef is good." This message, the ranchers say, ignores the fact that not all beef is the same; the ads fail to distinguish, for example, the American ranchers' grain-fed beef from the grass-fed beef predominant in the imports, which the Americans consider inferior.

The ranchers' complaint is on all fours with the objection of the mushroom growers in *United States* v. *United Foods, Inc.*, 533 U. S. 405 (2001), where a similar statutory exaction was struck down as a compelled subsidy of speech prohibited by the First Amendment absent a comprehensive regulatory scheme to which the speech was incidental. The defense of the Government's actions in these cases, however, differs from the position of the United States in *United Foods*. There we left open the possibility that a compelled subsidy would be justifiable not only as one element of an otherwise valid regulatory scheme, but also as speech of the Government itself, which the Government may pay for with revenue (usually from taxes) exacted from those who dissent from the message as well as from those who agree with it or do not care about it. Not surprisingly, the Government argues here that the beef advertising is its own speech, exempting it from the First Amendment bar against extracting special subsidies from those unwilling to underwrite an objectionable message.

The Court accepts the defense unwisely. The error is not that government speech can never justify compelling a subsidy, but that a compelled subsidy should not be justifiable by speech unless the government must put that speech forward as its own. Otherwise there is no check whatever on government's power to compel special speech subsidies, and the rule of *United Foods* is a dead letter. I take the view that if government relies on the government-speech doctrine to compel specific groups to fund speech with targeted taxes, it must make itself politically accountable by indicating that the content actually is a government message, not just the statement of one self-interested group the government is

currently willing to invest with power. Sometimes, as in these very cases, government can make an effective disclosure only by explicitly labeling the speech as its own. Because the Beef Act fails to require the Government to show its hand, I would affirm the judgment of the Court of Appeals holding the Act unconstitutional, and I respectfully dissent from the Court's decision to condone this compelled subsidy.[1]

* * *

In 1779 Jefferson wrote that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves . . . is sinful and tyrannical." A Bill for Establishing Religious Freedom, in 5 The Founder's Constitution, No. 37, p. 77 (P. Kurland & R. Lerner eds. 1987), codified in 1786 at Va. Code Ann. § 57–1 (Lexis 2003). Although he was not thinking about compelled advertising of farm produce, we echoed Jefferson's view four years ago in *United Foods*, where we said that "First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors . . . ." 533 U. S., at 411. *United Foods* addressed a scheme of enforced exaction virtually identical to the one here, except that the product involved was mushrooms, not beef. There, as here, a federal statute forced a targeted group (mushroom growers) to pay a tax that funded ads promoting its members' produce at a generic level objectionable to some of them. We held that the mushroom statute violated the growers' First Amendment right to refuse to pay for expression when they object to its content.[2]

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[1] The Government's petition for certiorari also presented a question as to whether more limited relief might be available, but the Court denied certiorari on that question and hence it is not before us.

[2] We also noted that while the mushroom growers' disagreement with the ads' message "could be seen as minor . . . , there is no apparent principle which distinguishes out of hand minor debates about whether a

As the Court says, *ante*, at 557–559, *United Foods* was a descendent of two lines of precedent. The first, exemplified by *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943), and *Wooley* v. *Maynard*, 430 U. S. 705 (1977), stands for the principle that government may not force individuals to utter or convey messages they disagree with or, indeed, to say anything at all. The second, comprising *Keller* v. *State Bar of Cal.*, 496 U. S. 1 (1990), and *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209 (1977), is authority for the related proposition that, absent substantial justification, government may not force targeted individuals to pay for others to speak.

Four years before *United Foods* we held that one such ground was present where enforced contribution to objectionable speech is incidental to a "broader collective enterprise in which th[e] freedom to act independently is already constrained by the regulatory scheme." *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U. S. 457, 469 (1997). As noted, *United Foods* left open the possibility of another justification, that the objectionable message is "government speech," which our case law suggests is immune to many types of First Amendment challenge. See *ante*, at 558–559.

Although we declined to address the pertinence of a government-speech justification in *United Foods*, it is crucial to the defense of the statute here because, as the District Court and the Court of Appeals observed (and as the Court appears to agree), these cases are factually on all fours with

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branded mushroom is better than just any mushroom." *United Foods*, 533 U. S., at 411. The First Amendment, in other words, is not limited to "serious" or "substantial" disputes about content. Even if it were, the mushroom growers could have argued, as the ranchers could argue here, that because they would prefer to say nothing than to convey the message in the ads, the ads violate their First Amendment right not to speak at all. See, *e. g.*, *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U. S. 539, 559 (1985) ("There is necessarily, and within suitably defined areas, a [First Amendment] freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect" (internal quotation marks omitted)).

*United Foods*. See 335 F. 3d 711, 717 (CA8 2003) ("[W]e agree with the district court that '[t]he beef checkoff is, in all material respects, identical to the mushroom checkoff'" program challenged in *United Foods* (quoting 207 F. Supp. 2d 992, 1002 (SD 2002))), quoted *ante*, at 558. Unless, then, the doctrine of government speech is defined in such a way as to justify the targeted compulsion here, the enforced subsidy for beef ads must fail along with the mushroom subsidy. In my judgment the beef subvention should fail, for I, unlike the Court, do not believe that the beef ads qualify for treatment as speech by the Government.

The government-speech doctrine is relatively new, and correspondingly imprecise. In fact, the few cases in which we have addressed the doctrine have for the most part not gone much beyond such broad observations as "[t]he government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies." *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. 217, 229 (2000). Even at this somewhat early stage of development, however, two points about the doctrine are clear.

The first point of certainty is the need to recognize the legitimacy of government's power to speak despite objections by dissenters whose taxes or other exactions necessarily go in some measure to putting the offensive message forward to be heard. To govern, government has to say something, and a First Amendment heckler's veto of any forced contribution to raising the government's voice in the "marketplace of ideas"[3] would be out of the question. See

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[3] See *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., joined by Brandeis, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—th[e] . . . best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ").

*Keller*, *supra*, at 12–13 ("If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed").

The second fixed point of government-speech doctrine is that the First Amendment interest in avoiding forced subsidies is served, though not necessarily satisfied, by the political process as a check on what government chooses to say. "When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy." *Southworth*, *supra*, at 235; see also *Abood*, *supra*, at 259, n. 13 (Powell, J., concurring in judgment) ("[T]he reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people"). Democracy, in other words, ensures that government is not untouchable when its speech rubs against the First Amendment interests of those who object to supporting it; if enough voters disagree with what government says, the next election will cancel the message.

The adequacy of the democratic process to render the subsidization of government speech tolerable is, naturally, tied to the character of the subsidy. For when government funds its speech with general tax revenue, as it usually does, no individual taxpayer or group of taxpayers can lay claim to a special, or even a particularly strong, connection to the money spent (and hence to the speech funded). See *Massachusetts* v. *Mellon*, 262 U. S. 447, 486–487 (1923). Outrage is likely to be rare, and disagreement tends to stay temperate. But the relative palatability of a remote subsidy shared by every taxpayer is not to be found when the speech is funded with targeted taxes. For then, as here, the particular interests of those singled out to pay the tax are closely

linked with the expression, and taxpayers who disagree with it suffer a more acute limitation on their presumptive autonomy as speakers to decide what to say and what to pay for others to say. See *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U. S. 557, 573 (1995) ("[T]he fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message").[4]

When a targeted assessment thus makes the First Amendment affront more galling, it does, or should, follow that greater care is required to ensure that the political process can practically respond to limit the compulsion Jefferson inveighed against. Whereas it would simply be unrealistic to think that every speech subsidy from general revenue could or should be scrutinized for its amenability to effective politi-

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[4] The Court asserts that in fact there is no difference between a taxpayer's challenge to speech funded with general revenues, which our precedents foreclose, and a challenge to speech funded with targeted taxes. But the Court's lone authority for that position, our statement in *United States* v. *Lee*, 455 U. S. 252 (1982), that "[t]here is no principled way . . . to distinguish between general taxes and those imposed under the Social Security Act," *id.*, at 260, quoted *ante*, at 562, is unavailing. *Lee* involved a religious objection to paying Social Security taxes, and the Court's statement in that case was grounded in the recognition that if the Government were required to accommodate the objection, there would be nothing to stop others from raising a similar religious objection to paying "general taxes." Here there is no comparable danger because of the commonsense notion that individuals feel a closer connection to speech that they are singled out to fund with targeted taxes than they do to expression paid for with general revenues. We recognized this in *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923), where we noted that the individual taxpayer's "interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others [and] is comparatively minute and indeterminable." *Id.*, at 487. This commonsense notion, then, provides a "principled way" to distinguish in this context between targeted and general taxes. The Court in *Lee* seemed to recognize that its reasoning might be limited in this way, as the unredacted version of its statement reads: "[t]here is no principled way, however, for purposes of this case, to distinguish between general taxes and those imposed under the Social Security Act." 455 U. S., at 260.

cal response, the less-common targeted speech subsidies can be reviewed specifically for their susceptibility to response by the voters, and the intensity of the provocation experienced by the targeted group justifies just such scrutiny.

In these cases, the requirement of effective public accountability means the ranchers ought to prevail, it being clear that the Beef Act does not establish an advertising scheme subject to effective democratic checks. The reason for this is simple: the ads are not required to show any sign of being speech by the Government, and experience under the Act demonstrates how effectively the Government has masked its role in producing the ads.[5] Most obviously, many of them include the tagline, "[f]unded by America's Beef Producers," App. 50–51, which all but ensures that no one reading them will suspect that the message comes from the National Government.[6] But the tagline just underscores the point that would be true without it, that readers would most naturally think that ads urging people to have beef for dinner were placed and paid for by the beef producers who stand to profit when beef is on the table. No one hearing a commercial for Pepsi or Levi's thinks Uncle Sam is the man talking behind the curtain. Why would a person reading a beef ad think

[5] The Court thinks it is enough that the Government is not required to mislead in this way. *Ante*, at 564, n. 7. This view that the statute is saved because it might be applied without misleading readers apparently reflects the Court's position that these cases involve a facial challenge. *Ante*, at 564–565. But the challenge here is to the application of the statute through actual, misleading ads, as shown by a record replete with examples.

[6] Disputing this, petitioners Nebraska Cattlemen, Inc., et al., suggest that any danger of confusion is eliminated by the inclusion in the beef ads of a red checkmark with the word "beef" atop it, because this "distinctive checkoff logo is a direct sign that the ads are disseminated pursuant to the federal checkoff program." Reply Brief for Petitioners in No. 03–1165, pp. 15–16. It seems to me quite implausible that most (or even some) Americans associate a red checkmark underneath the word "beef" with the Federal Government. Indeed, it strikes me that even someone generally familiar with the Beef Act and its taxation mandate might not recognize the checkoff logo as signifying Government involvement.

Uncle Sam was trying to make him eat more steak?[7] Given the circumstances, it is hard to see why anyone would suspect the Government was behind the message unless the message came out and said so.

The Court takes the view that because Congress authorized this scheme and the Government controls (or at least has a veto on) the content of the beef ads, the need for democratic accountability has been satisfied. See *ante*, at 563–564. But the Court has it backwards. It means nothing that Government officials control the message if that fact is never required to be made apparent to those who get the message, let alone if it is affirmatively concealed from them. The political accountability of the officials with control is insufficient, in other words, just because those officials are allowed to use their control (and in fact are deliberately using it) to conceal their role from the voters with the power to hold them accountable.[8] Unless the putative government

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[7] Moreover, anyone who did draw such an unlikely connection would also have to believe that Uncle Sam was having a hard time making his mind up, for other, expressly governmental messages take a different view of how much beef Americans should be eating. Dietary Guidelines for Americans 2005, a publication of the Departments of Agriculture and of Health and Human Services, discusses beef in a chapter entitled "Fats." Http://www.health.gov/dietaryguidelines/dga2005/document (as visited May 16, 2005, and available in Clerk of Court's case file). The message of that chapter is that most Americans need to reduce their consumption of fats, and should get most of the fats they do eat from sources other than beef, namely, fish, nuts, and vegetable oils. See *id.*, at 29–31. That the report, which the Secretaries of Agriculture and of Health and Human Services say "is intended to be a primary source of dietary health information," *id.*, at i, does not encourage the consumption of beef (as the beef ads do) is clear from the fact that a different chapter, which discusses fruits, vegetables, whole grains, and fat-free dairy products, is entitled "Food Groups to Encourage," *id.*, at 23.

[8] Notably, the Court nowhere addresses how, or even whether, the benefits of allowing government to mislead taxpayers by concealing its sponsorship of expression outweigh the additional imposition on First Amendment rights that results from it. Indeed, the Court describes no benefits from its approach and gives no reason to think First Amendment doctrine

speech appears to be coming from the government, its governmental origin cannot possibly justify the burden on the First Amendment interests of the dissenters targeted to pay for it.[9]

Nor is it any answer that resourceful taxpayers could discover the Government behind the beef ads by doing research on the implementation of the Beef Act. Of course a taxpayer could discover the facts by looking hard enough, but what would tip off the taxpayer to look? And even if a few taxpayers did unearth the truth it would not matter, for the First Amendment harm cannot be mitigated by the possibility that a few cognoscenti may actually understand how the scheme works. If the judiciary is justified in keeping hands off special assessments on dissenters from government speech, it is because there is a practical opportunity for political response; esoteric knowledge on the part of a few will not do.

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should accommodate the Government's subterfuge. The Court merely observes that no precedent requires the Government to show its hand when it seeks to defend a targeted assessment by claiming government speech. *Ante*, at 564, n. 7. That is of course to be expected, since the government-speech doctrine is so new that the Government has never before enjoyed the opportunity to invoke it in this Court when attempting to justify the type of compelled subsidy struck down in *United Foods*. Since the Court now says the Government need never show its hand in cases like this one, *ante*, at 564–565, there is no chance for an effective political check on forced funding for speech, however objectionable.

[9] That said, I do not mean to suggest that explicitly labeling speech as that of government would suffice when individuals must personally convey government's message, as in *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943), and *Wooley* v. *Maynard*, 430 U. S. 705 (1977). The infringement on the speaker's autonomy in those situations is greater than in cases like the ones before us today, so great that it cannot be saved by allowing speakers to inform listeners that they (the speakers) are simply communicating a government message or that they disagree with the message. The Court apparently took the same view in *Wooley*, as it was unmoved by the dissent's observation in that case that New Hampshire drivers were free to "place on their bumper a conspicuous bumper sticker explaining in no uncertain terms that they do not profess the motto 'Live Free or Die.'" *Id.*, at 722 (opinion of REHNQUIST, J.).

In sum, the First Amendment cannot be implemented by sanctioning government deception by omission (or by misleading statement) of the sort the Court today condones, and expression that is not ostensibly governmental, which government is not required to embrace as publicly as it speaks, cannot constitute government speech sufficient to justify enforcement of a targeted subsidy to broadcast it. The Court of Appeals thus correctly held that *United Foods* renders the Beef Act's mandatory-assessment provisions unconstitutional.[10]

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[10] Petitioners also defend the Beef Act by pointing to *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n of N. Y.*, 447 U. S. 557 (1980), where we subjected restrictions on commercial speech to a less rigorous level of review than that applied to restrictions on most other types of speech. But the Court strongly suggested in *Glickman* v. *Wileman Brothers & Elliott, Inc.*, 521 U. S. 457, 469 (1997), and in *United States* v. *United Foods, Inc.*, 533 U. S. 405 (2001), both that *Central Hudson* scrutiny is not appropriate in a case involving compelled speech rather than restrictions on speech, and that even if some relaxed standard of review analogous to *Central Hudson* were employed the Beef Act would not survive it. See *Glickman*, *supra*, at 474, n. 18 ("The Court of Appeals fails to explain why the *Central Hudson* test, which involved a restriction on commercial speech, should govern a case involving the compelled funding of speech"); *United Foods*, *supra*, at 410 ("[E]ven viewing commercial speech as entitled to lesser protection, we find no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case"). Petitioners do not explain why we should depart from these intimations that restrictions on speech are not judged by the same standard as compelled speech.

Syllabus

# CLINGMAN, SECRETARY, OKLAHOMA STATE ELECTION BOARD, ET AL. *v.* BEAVER ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 04–37. Argued January 19, 2005—Decided May 23, 2005

Under Oklahoma's semiclosed primary law, a political party may invite only its own registered members and voters registered as Independents to vote in its primary. When the Libertarian Party of Oklahoma (LPO) notified the State Election Board it wanted to open its upcoming primary to all registered voters regardless of party affiliation, the board agreed as to Independents, but not as to other parties' members. The LPO and several Oklahomans registered as Republicans and Democrats then sued for equitable relief, alleging that Oklahoma's statute unconstitutionally burdens their First Amendment right to freedom of political association. The District Court upheld the statute on the grounds that it did not severely burden respondents' associational rights and that any burden imposed was justified by Oklahoma's asserted interests in preserving parties as viable and identifiable interest groups and in ensuring that primary results accurately reflect party members' voting. Reversing, the Tenth Circuit concluded that the statute imposed a severe burden on respondents' associational rights and was not narrowly tailored to serve a compelling state interest.

*Held:* The judgment is reversed, and the case is remanded.

363 F. 3d 1048, reversed and remanded.

JUSTICE THOMAS delivered the opinion of the Court except as to Part II–A, concluding that Oklahoma's semiclosed primary system does not violate the right to freedom of association. Any burden it imposes is minor and justified by legitimate state interests. Pp. 586–587, 591–598.

(a) The First Amendment protects citizens' right "to band together in promoting among the electorate candidates who espouse their political views." *California Democratic Party* v. *Jones*, 530 U. S. 567, 574. Regulations imposing severe burdens on associational rights must be narrowly tailored to serve a compelling state interest, but when they impose lesser burdens, "a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Timmons* v. *Twin Cities Area New Party*, 520 U. S. 351, 358. In *Tashjian* v. *Republican Party of Conn.*, 479 U. S. 208, 224, n. 13, the Court

left open the question whether a State may prevent a political party from inviting registered voters of other parties to vote in its primary. Pp. 586–587.

(b) Oklahoma's system does not severely burden associational rights. The Court disagrees with respondents' argument that the burden Oklahoma imposes is no less severe than the burden at issue in *Tashjian*, and thus the Court must apply strict scrutiny as it did in *Tashjian*. *Tashjian* applied strict scrutiny without carefully examining the burden on associational rights. Not every electoral law burdening associational rights is subject to strict scrutiny, which is appropriate only if the burden is severe, *e. g.*, *Jones*, *supra*, at 582. Requiring voters to register with a party before participating in its primary minimally burdens voters' associational rights. Moreover, *Tashjian* is distinguishable. Oklahoma's semiclosed primary imposes an even less substantial burden than did the Connecticut closed primary at issue in *Tashjian*. Unlike that law, Oklahoma's system does not require Independent voters to affiliate publicly with a party to vote in its primary, 479 U. S., at 216, n. 7. Although, like the earlier law, Oklahoma's statute does not allow parties to "broaden opportunities for joining . . . by their own act," but requires "intervening action by potential voters," *ibid.*, this burden is not severe, since many electoral regulations require that voters take some action to participate in the primary process. Such minor barriers between voter and party do not compel strict scrutiny. See *Bullock* v. *Carter*, 405 U. S. 134, 143. To deem ordinary and widespread burdens like these severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes. The Constitution does not require that result. Pp. 591–593.

(c) Oklahoma's primary advances a number of regulatory interests this Court recognizes as important: It "preserv[es] [political] parties as viable and identifiable interest groups," *Nader* v. *Schaffer*, 417 F. Supp. 837, 845 (Conn.), aff'd, 429 U. S. 989; enhances parties' electioneering and party-building efforts, 417 F. Supp., at 848; and guards against party raiding and "sore loser" candidacies by spurned primary contenders, *Storer* v. *Brown*, 415 U. S. 724, 735. Pp. 593–597.

(d) The Court declines to consider respondents' expansion of their challenge to include several of Oklahoma's ballot access and voter registration laws. Those claims were neither raised nor decided below, see, *e. g.*, *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U. S. 157, 168–169, and respondents have pointed to no unusual circumstances warranting their consideration now, see *Taylor* v. *Freeland & Kronz*, 503 U. S. 638, 645–646. Pp. 597–598.

Syllabus

JUSTICE THOMAS, joined by THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY, concluded in Part II–A that a voter unwilling to disaffiliate from another party in order to vote in the LPO's primary forms little "association" with the LPO—nor the LPO with him. See *Tashjian*, *supra*, at 235. But even if Oklahoma's system burdens an associational right, the burden is less severe than others this Court has upheld as constitutional. The reasons underpinning *Timmons*, *supra*, show that Oklahoma's system burdens the LPO only minimally. As in *Timmons*, Oklahoma's law does not regulate the LPO's internal processes, its authority to exclude unwanted members, or its capacity to communicate with the public. And just as in *Timmons*, in which a Minnesota law conditioned a party's ability to nominate the candidate of its choice on the candidate's willingness to disaffiliate from another party, Oklahoma conditions a party's ability to welcome a voter into its primary on the voter's willingness to dissociate from his current party of choice. If a party may be prevented from associating with its desired standard bearer because he refuses to disaffiliate from another party, it may also be prevented from associating with a voter who refuses to do the same. Oklahoma's system imposes an even slighter burden on voters than on the LPO. Disaffiliation is not difficult: Other parties' registered members who wish to vote in the LPO primary simply need to file a form changing their registration. Voters are not "locked in" to an unwanted party affiliation, see *Kusper* v. *Pontikes*, 414 U. S. 51, 60–61, because with only nominal effort they are free to vote in the LPO primary. Pp. 587–591.

JUSTICE O'CONNOR, joined by JUSTICE BREYER except as to Part III, agreed with most of the Court's reasoning, but wrote separately to emphasize two points. First, the Libertarian Party of Oklahoma (LPO) and voters registered with another party have constitutionally cognizable interests in associating with one another through the LPO's primary, and these interests should not be minimized to dispose of this case. Second, while the Court is correct that only Oklahoma's semiclosed primary law is properly under review, that standing alone it imposes only a modest, nondiscriminatory burden on respondents' associational rights, and that this burden is justified by the State's legitimate regulatory interests, there are some grounds for concern that other Oklahoma laws governing party recognition and changes in party affiliation may unreasonably restrict voters' ability to participate in the LPO's primary. A realistic assessment of regulatory burdens on associational rights would, in an appropriate case, require examination of the cumulative effects of the State's overall primary scheme; and any finding of a more severe burden would trigger more probing review of the State's justifications. Pp. 598–608.

THOMAS, J., delivered an opinion, which was for the Court except as to Part II–A. REHNQUIST, C. J., and SCALIA and KENNEDY, JJ., joined that opinion in full, and O'CONNOR and BREYER, JJ., joined except as to Part II–A. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in which BREYER, J., joined except as to Part III, *post*, p. 598. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, and in which SOUTER, J., joined as to Parts I, II, and III, *post*, p. 608.

*Wellon B. Poe, Jr.*, Assistant Attorney General of Oklahoma, argued the cause for petitioners. With him on the briefs was *W. A. Drew Edmondson*, Attorney General.

*James C. Linger* argued the cause and filed a brief for respondents.*

JUSTICE THOMAS delivered the opinion of the Court, except as to Part II–A.

Oklahoma has a semiclosed primary system, in which a political party may invite only its own party members and voters registered as Independents to vote in the party's primary. The Court of Appeals held that this system violates the right to freedom of association of the Libertarian Party of Oklahoma (LPO) and several Oklahomans who are registered members of the Republican and Democratic Parties. We hold that it does not.

I

Oklahoma's election laws provide that only registered members of a political party may vote in the party's primary,

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*A brief of *amici curiae* urging reversal was filed for the State of South Dakota et al. by *Lawrence E. Long*, Attorney General of South Dakota, *Craig M. Eichstadt*, Deputy Attorney General, and *Gene C. Schaerr*, and by the Attorneys General for their respective States as follows: *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Kelly A. Ayotte* of New Hampshire, *Patricia A. Madrid* of New Mexico, *Roy Cooper* of North Carolina, *Mark Shurtleff* of Utah, and *Darrell V. McGraw, Jr.*, of West Virginia.

A brief of *amicus curiae* urging affirmance was filed for the Coalition for Free and Open Elections by *Richard Shepard*.

see Okla. Stat. Ann., Tit. 26, § 1–104(A) (West 1997), unless the party opens its primary to registered Independents as well, see § 1–104(B)(1). In May 2000, the LPO notified the secretary of the Oklahoma State Election Board that it wanted to open its upcoming primary to all registered Oklahoma voters, without regard to their party affiliation. See § 1–104(B)(4) (requiring notice when a party opens its primary to Independents). Pursuant to § 1–104, the secretary agreed as to Independent voters, but not as to voters registered with other political parties. The LPO and several Republican and Democratic voters then sued for declaratory and injunctive relief in the United States District Court for the Western District of Oklahoma, alleging that Oklahoma's semiclosed primary law unconstitutionally burdens their First Amendment right to freedom of political association. App. 20.

After a hearing, the District Court declined to enjoin Oklahoma's semiclosed primary law for the 2000 primaries. After a 2-day bench trial following the primary election, the District Court found that Oklahoma's semiclosed primary system did not severely burden respondents' associational rights. Further, it found that any burden imposed by the system was justified by Oklahoma's asserted interest in "preserving the political parties as viable and identifiable interest groups, [and] insuring that the results of a primary election . . . accurately reflect the voting of the party members." Memorandum Opinion, Case No. CIV–00–1071–F (WD Okla., Jan. 24, 2003), App. to Pet. for Cert. 55–56 (hereinafter Memorandum Opinion) (internal quotation marks omitted). The District Court therefore upheld the semiclosed primary statute as constitutional. *Id.*, at 72–73.

On appeal, the Court of Appeals for the Tenth Circuit reversed the judgment of the District Court. The Court of Appeals concluded that the State's semiclosed primary statute imposed a severe burden on respondents' associational rights, and thus was constitutional only if the statute was

narrowly tailored to serve a compelling state interest. 363 F. 3d 1048, 1057–1058 (2004). Finding none of Oklahoma's interests compelling, the Court of Appeals enjoined Oklahoma from using its semiclosed primary law. *Id.*, at 1060–1061. Because the Court of Appeals' decision not only prohibits Oklahoma from using its primary system but also casts doubt on the semiclosed primary laws of 23 other States,[1] we granted certiorari. 542 U. S. 965 (2004).

## II

The Constitution grants States "broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices." *Tashjian* v. *Republican Party of Conn.*, 479 U. S. 208, 217 (1986); *Timmons* v. *Twin Cities Area New Party*, 520 U. S. 351, 358 (1997) (quoting *Tashjian*). We have held that the First Amendment, among other things, protects the right of citizens "to band together in promoting among the electorate candidates who espouse their political views." *California Democratic Party* v. *Jones*, 530 U. S. 567, 574 (2000). Regulations that impose severe burdens on associational rights must be narrowly tailored to serve a compelling state interest. *Timmons*, 520 U. S., at 358. However,

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[1] Ariz. Rev. Stat. Ann. § 16–241(A) (West 1996); Cal. Elec. Code Ann. § 13102 (West 2003); Colo. Rev. Stat. § 1–3–101(1) (Lexis 2004); Conn. Gen. Stat. § 9–431(a) (2005); Del. Code Ann., Tit. 15, § 3110 (Lexis 1999); Fla. Stat. § 101.021 (2003); Iowa Code §§ 43.38, 43.42 (2003); Kan. Stat. Ann. § 25–4502 (2000); Ky. Rev. Stat. Ann. § 116.055 (Lexis 2004); La. Stat. Ann. § 18:1280.25 (West Supp. 2005); Mass. Gen. Laws Ann., ch. 53, § 37 (West Supp. 2005); Neb. Rev. Stat. § 32–312 (2004); Nev. Rev. Stat. § 293.287 (2003); N. H. Rev. Stat. Ann. § 659:14 (West 1996); N. J. Stat. Ann. § 19:23–45.1 (West Supp. 2004); N. M. Stat. Ann. § 1–12–7 (1995); N. Y. Elec. Law Ann. § 1–104.9 (West 2004); N. C. Gen. Stat. § 163–59 (Lexis 2003); Pa. Stat. Ann., Tit. 25, § 292 (Purdon 1994); R. I. Gen. Laws §§ 17–9.1–24, 17–15–24 (Lexis 2003); S. D. Codified Laws § 12–6–26 (West 2004); W. Va. Code § 3–1–35 (Lexis 2002); Wyo. Stat. § 22–5–212 (Lexis 1977–2003).

when regulations impose lesser burdens, "a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Ibid.* (internal quotation marks omitted).

In *Tashjian*, this Court struck down, as inconsistent with the First Amendment, a closed primary system that prevented a political party from inviting Independent voters to vote in the party's primary. 479 U. S., at 225. This case presents a question that *Tashjian* left open: whether a State may prevent a political party from inviting registered voters of other parties to vote in its primary. *Id.*, at 224, n. 13. As *Tashjian* acknowledged, opening a party's primary "to all voters, including members of other parties, . . . raise[s] a different combination of considerations." *Ibid.* We are persuaded that any burden Oklahoma's semiclosed primary imposes is minor and justified by legitimate state interests.

A

At the outset, we note that Oklahoma's semiclosed primary system is unlike other laws this Court has held to infringe associational rights. Oklahoma has not sought through its electoral system to discover the names of the LPO's members, see *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 451 (1958); to interfere with the LPO by restricting activities central to its purpose, see *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 895 (1982); *NAACP* v. *Button*, 371 U. S. 415, 423–426 (1963); to disqualify the LPO from public benefits or privileges, see *Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 595–596 (1967); or to compel the LPO's association with unwanted members or voters, see *Jones*, *supra*, at 577. The LPO is free to canvass the electorate, enroll or exclude potential members, nominate the candidate of its choice, and engage in the same electoral activities as every other political party in Oklahoma. Oklahoma merely prohibits the LPO from leaving the selection of its candidates to people who are members of

another political party. Nothing in § 1–104 prevents members of other parties from switching their registration to the LPO or to Independent status.[2] The question is whether the Constitution requires that voters who are registered in other parties be allowed to vote in the LPO's primary.

In other words, the Republican and Democratic voters who have brought this action do not want to associate with the LPO, at least not in any formal sense. They wish to remain registered with the Republican, Democratic, or Reform parties, and yet to assist in selecting the Libertarian Party's candidates for the general election. Their interest is in casting a vote for a Libertarian candidate in a particular primary election,[3] rather than in banding together with fellow citizens committed to the LPO's political goals and ideas. See *Jones*, *supra*, at 573–574, n. 5 ("As for the associational 'interest' in selecting the candidate of a group to which one does not belong, that falls far short of a constitutional right, if indeed it

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[2] Respondents argue, for the first time before this Court, that Oklahoma election statutes other than § 1–104 make it difficult for voters to disaffiliate from their parties of first choice and register as Libertarians or Independents (either of which would allow them to vote in the LPO primary). Brief for Respondents 13–19. For reasons we explain fully in Part III, we decline to consider this aspect of respondents' challenge. See *infra*, at 597–598.

[3] Respondents who are members of the Republican and Democratic Parties alleged before the District Court that they wished to have the right to participate in the 2000 LPO primary. See Amended Complaint 4, Record Doc. 23; Complaint 3, *id.*, Doc. 1. The only evidence respondents submitted on this point was a pair of affidavits from respondents Mary Burnett (a registered Republican) and Floyd Turner (a registered Democrat), asserting that each might have wished to vote in the 2000 LPO primary. See Plaintiffs' Motion for Preliminary Injunction, *id.*, Doc. 9 (attached affidavits). Based on Turner's affidavit, the parties stipulated that there were "a number of voters" "registered in political parties other than the [LPO] who wish[ed] to vote" in the 2000 LPO primary. See Supplemental Joint Stipulations of Fact ¶ 32, *id.*, Doc. 17. Respondents have never claimed that they are prevented from associating with the LPO in any way, except that they are unable to vote in the LPO's primary and runoff elections.

can even fairly be characterized as an interest"). And the LPO is happy to have their votes, if not their membership on the party rolls.

However, a voter who is unwilling to disaffiliate from another party to vote in the LPO's primary forms little "association" with the LPO—nor the LPO with him. See *Tashjian*, *supra*, at 235 (SCALIA, J., dissenting). That same voter might wish to participate in numerous party primaries, or cast ballots for several candidates, in any given race. The issue is not "dual associations," *post*, at 601 (O'CONNOR, J., concurring in part and concurring in judgment), but seemingly boundless ones. "If the concept of freedom of association is extended" to a voter's every desire at the ballot box, "it ceases to be of any analytic use." *Tashjian*, *supra*, at 235 (SCALIA, J., dissenting); cf. *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U. S. 107, 130 (1981) (Powell, J., dissenting) ("[Not] every conflict between state law and party rules concerning participation in the nomination process creates a burden on associational rights").

But even if Oklahoma's semiclosed primary system burdens an associational right, the burden is less severe than others this Court has upheld as constitutional. For instance, in *Timmons*, we considered a Minnesota election law prohibiting multiparty, or "fusion," candidacies in which a candidate appears on the ballot as the nominee of more than one party. 520 U. S., at 353–354. Minnesota's law prevented the New Party, a minor party under state law, from putting forward the same candidate as a major party. The New Party challenged the law as unconstitutionally burdening its associational rights. *Id.*, at 354–355. This Court concluded that the burdens imposed by Minnesota's law—"though not trivial—[were] not severe." *Id.*, at 363.

The burdens were not severe because the New Party and its members remained free to govern themselves internally and to communicate with the public as they wished. *Ibid.*

Minnesota had neither regulated the New Party's internal decisionmaking process, nor compelled it to associate with voters of any political persuasion, see *Jones*, 530 U. S., at 577. The New Party and its members simply could not nominate as their candidate any of "those few individuals who both have already agreed to be another party's candidate and also, if forced to choose, themselves prefer that other party." *Timmons*, *supra*, at 363.

The same reasons underpinning our decision in *Timmons* show that Oklahoma's semiclosed primary system burdens the LPO only minimally. As in *Timmons*, Oklahoma's law does not regulate the LPO's internal processes, its authority to exclude unwanted members, or its capacity to communicate with the public. And just as in *Timmons*, in which Minnesota conditioned the party's ability to nominate the candidate of its choice on the candidate's willingness to disaffiliate from another political party, Oklahoma conditions the party's ability to welcome a voter into its primary on the voter's willingness to dissociate from his current party of choice. If anything, it is "[t]he moment of choosing the party's nominee" that matters far more, *Jones*, 530 U. S., at 575, for that is "'the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community,'" *ibid.* (quoting *Tashjian*, 479 U. S., at 216). If a party may be prevented from associating with the candidate of its choice—its desired "'standard bearer,'" *Timmons*, *supra*, at 359; *Jones*, *supra*, at 575—because that candidate refuses to disaffiliate from another political party, a party may also be prevented from associating with a voter who refuses to do the same.

Oklahoma's semiclosed primary system imposes an even slighter burden on voters than on the LPO. Disaffiliation is not difficult: In general, "anyone can 'join' a political party merely by asking for the appropriate ballot at the appropriate time or (at most) by registering within a state-defined reasonable period of time before an election." *Jones*, *supra*,

at 596 (STEVENS, J., dissenting). In Oklahoma, registered members of the Republican, Democratic, and Reform Parties who wish to vote in the LPO primary simply need to file a form with the county election board secretary to change their registration. See Okla. Stat. Ann., Tit. 26, §4–119 (West Supp. 2005). Voters are not "locked in" to an unwanted party affiliation, see *Kusper* v. *Pontikes*, 414 U. S. 51, 60–61 (1973), because with only nominal effort they are free to vote in the LPO primary. For this reason, too, the registration requirement does not unduly hinder the LPO from associating with members of other parties. To attract members of other parties, the LPO need only persuade voters to make the minimal effort necessary to switch parties.

B

Respondents argue that this case is no different from *Tashjian*. According to respondents, the burden imposed by Oklahoma's semiclosed primary system is no less severe than the burden at issue in *Tashjian*, and hence we must apply strict scrutiny as we did in *Tashjian*. We disagree. At issue in *Tashjian* was a Connecticut election statute that required voters to register with a political party before participating in its primary. 479 U. S., at 210–211. The State's Republican Party, having adopted a rule that allowed Independent voters to participate in its primary, contended that Connecticut's closed primary infringed its right to associate with Independent voters. *Ibid.* Applying strict scrutiny, this Court found that the interests Connecticut advanced to justify its ban were not compelling, and thus that the State could not constitutionally prevent the Republican Party from inviting into its primary willing Independent voters. *Id.*, at 217–225.

Respondents' reliance on *Tashjian* is unavailing. As an initial matter, *Tashjian* applied strict scrutiny with little discussion of the magnitude of the burdens imposed by Connecticut's closed primary on parties' and voters' associational

rights. *Post*, at 605 (O'CONNOR, J., concurring in part and concurring in judgment). But not every electoral law that burdens associational rights is subject to strict scrutiny. See, *e. g.*, *Nader* v. *Schaffer*, 417 F. Supp. 837, 849 (Conn.) ("There must be more than a minimal infringement on the rights to vote and of association . . . before strict judicial review is warranted"), aff'd, 429 U. S. 989 (1976). Instead, as our cases since *Tashjian* have clarified, strict scrutiny is appropriate only if the burden is severe. *Jones*, *supra*, at 582; *Timmons*, 520 U. S., at 358. In *Tashjian* itself, Independent voters could join the Connecticut Republican Party as late as the day before the primary. 479 U. S., at 219. As explained above, *supra*, at 590–591, requiring voters to register with a party prior to participating in the party's primary minimally burdens voters' associational rights.

Nevertheless, *Tashjian* is distinguishable. Oklahoma's semiclosed primary imposes an even less substantial burden than did the Connecticut closed primary at issue in *Tashjian*. In *Tashjian*, this Court identified two ways in which Connecticut's closed primary limited citizens' freedom of political association. The first and most important was that it required Independent voters to affiliate publicly with a party to vote in its primary. 479 U. S., at 216, n. 7. That is not true in this case. At issue here are voters who have *already* affiliated publicly with one of Oklahoma's political parties. These voters need not register as Libertarians to vote in the LPO's primary; they need only declare themselves Independents, which would leave them free to participate in any party primary that is open to registered Independents. See Okla. Stat. Ann., Tit. 26, § 1–104(B)(1) (West 1997).

The second and less important burden imposed by Connecticut's closed primary system was that political parties could not "broaden opportunities for joining . . . by their own act, without any intervening action by potential voters." *Tashjian*, 479 U. S., at 216, n. 7. Voters also had to act by registering themselves in a particular party. *Ibid.* That is

equally true of Oklahoma's semiclosed primary system: Voters must register as Libertarians or Independents to participate in the LPO's primary. However, *Tashjian* did not characterize this burden alone as severe, and with good reason. Many electoral regulations, including voter registration generally, require that voters take some action to participate in the primary process. See, *e. g.*, *Rosario* v. *Rockefeller*, 410 U. S. 752, 760–762 (1973) (upholding requirement that voters change party registration 11 months in advance of the primary election). Election laws invariably "affec[t]—at least to some degree—the individual's right to vote and his right to associate with others for political ends." *Anderson* v. *Celebrezze*, 460 U. S. 780, 788 (1983).

These minor barriers between voter and party do not compel strict scrutiny. See *Bullock* v. *Carter*, 405 U. S. 134, 143 (1972). To deem ordinary and widespread burdens like these severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes. The Constitution does not require that result, for it is beyond question "that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons*, *supra*, at 358; *Storer* v. *Brown*, 415 U. S. 724, 730 (1974). Oklahoma's semiclosed primary system does not severely burden the associational rights of the State's citizenry.

C

When a state electoral provision places no heavy burden on associational rights, "a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Timmons*, *supra*, at 358 (internal quotation marks omitted); *Anderson*, *supra*, at 788. Here, Oklahoma's semiclosed primary advances a number of regulatory interests that this Court recognizes as important: It

"preserv[es] [political] parties as viable and identifiable interest groups," *Nader*, 417 F. Supp., at 845; enhances parties' electioneering and party-building efforts, *id.*, at 848; and guards against party raiding and "sore loser" candidacies by spurned primary contenders, *Storer*, *supra*, at 735.

First, as Oklahoma asserts, its semiclosed primary "preserv[es] the political parties as viable and identifiable interest groups, insuring that the results of a primary election, in a broad sense, accurately reflec[t] the voting of the party members." Amended and Supplemental Trial Brief of Defendants 10, Record Doc. 63 (quoting without attribution *Nader*, *supra*, at 845). The LPO wishes to open its primary to registered Republicans and Democrats, who may well vote in numbers that dwarf the roughly 300 registered LPO voters in Oklahoma. See Memorandum Opinion 31–32 (at least 95% of voters in LPO's 1996 primary were independents, not Libertarians). If the LPO is permitted to open its primary to all registered voters regardless of party affiliation, the candidate who emerges from the LPO primary may be "unconcerned with, if not . . . hostile to," the political preferences of the majority of the LPO's members. *Nader*, *supra*, at 846. It does not matter that the LPO is willing to risk the surrender of its identity in exchange for electoral success. Oklahoma's interest is independent and concerns the integrity of its primary system. The State wants to "avoid primary election outcomes which would tend to confuse or mislead the general voting population to the extent [it] relies on party labels as representative of certain ideologies." Brief for Petitioners 12 (quoting without attribution *Nader*, *supra*, at 845); *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214, 228 (1989).

Moreover, this Court has found that "'[i]n facilitating the effective operation of [a] democratic government, a state might reasonably classify voters or candidates according to political affiliations.'" *Nader*, *supra*, at 845–846 (quoting *Ray* v. *Blair*, 343 U. S. 214, 226, n. 14 (1952)). But for that

classification to mean much, Oklahoma must be allowed to limit voters' ability to roam among parties' primaries. The purpose of party registration is to provide "a minimal demonstration by the voter that he has some 'commitment' to the party in whose primary he wishes to participate." *Nader, supra*, at 847. That commitment is lessened if party members may retain their registration in one party while voting in another party's primary. Opening the LPO's primary to all voters not only would render the LPO's *imprimatur* an unreliable index of its candidate's actual political philosophy, but it also "would make registered party affiliations significantly less meaningful in the Oklahoma primary election system." Memorandum Opinion 59. Oklahoma reasonably has concluded that opening the LPO's primary to all voters regardless of party affiliation would undermine the crucial role of political parties in the primary process. Cf. *Jones*, 530 U. S., at 574.

Second, Oklahoma's semiclosed primary system, by retaining the importance of party affiliation, aids in parties' electioneering and party-building efforts. "It is common experience that direct solicitation of party members—by mail, telephone, or face-to-face contact, and by the candidates themselves or by their active supporters—is part of any primary election campaign." *Nader, supra*, at 848. Yet parties' voter turnout efforts depend in large part on accurate voter registration rolls. See, *e. g., Council of Alternative Political Parties* v. *State Div. of Elections*, 344 N. J. Super. 225, 231–232, 781 A. 2d 1041, 1045 (2001) ("It is undisputed that the voter registration lists, with voter affiliation information, . . . provide essential information to the [party state committees] for other campaign and party-building activities, including canvassing and fundraising").

When voters are no longer required to disaffiliate before participating in other parties' primaries, voter registration rolls cease to be an accurate reflection of voters' political preferences. And without registration rolls that accurately

reflect likely or potential primary voters, parties risk expending precious resources to turn out party members who may have decided to cast their votes elsewhere. See Brief for State of South Dakota et al. as *Amici Curiae* 20–21. If encouraging citizens to vote is an important state interest, see *Jones, supra,* at 587 (KENNEDY, J., concurring), then Oklahoma is entitled to protect parties' ability to plan their primaries for a stable group of voters. Tr. of Oral Arg. 26.

Third, Oklahoma has an interest in preventing party raiding, or "the organized switching of blocs of voters from one party to another in order to manipulate the outcome of the other party's primary election." *Anderson,* 460 U. S., at 788–789, n. 9; *Jones, supra,* at 572. For example, if the outcome of the Democratic Party primary were not in doubt, Democrats might vote in the LPO primary for the candidate most likely to siphon off votes from the Republican candidate in the general election. Or a Democratic primary contender who senses defeat might launch a "sore loser" candidacy by defecting to the LPO primary, taking with him loyal Democratic voters, and thus undermining the Democratic Party in the general election.[4] *Storer,* 415 U. S., at 735. Oklahoma has an interest in "temper[ing] the destabilizing effects" of precisely this sort of "party splintering and excessive fac-

[4] To be most effective, a spurned candidate would have to defect in advance of the primary election. Before a candidate may file for nomination by a political party to any state or county office in Oklahoma, generally the candidate must have been a registered member of the party for six months prior to filing. See Okla. Stat. Ann., Tit. 26, § 5–105(A) (West 1997). However, the registration period is only 15 days for candidates from parties, like the LPO, whose lack of electoral support means that they must regularly petition to be recognized as political parties. *Ibid.*; see also §§ 1–108, 1–109 (West Supp. 2005) (Oklahoma's ballot access requirements). But even though candidates may defect up to two weeks before the primary, registered Republican and Democratic voters may not change their party affiliation after June 1, roughly eight weeks before the primary. See § 4–119; see also § 1–102 (setting primary on last Tuesday of July).

tionalism." *Timmons*, 520 U. S., at 367; cf. *Davis* v. *Bandemer*, 478 U. S. 109, 144–145 (1986) (O'CONNOR, J., concurring in judgment). Oklahoma's semiclosed primary system serves that interest by discouraging voters from temporarily defecting from another party to vote in the LPO primary. While the State's interest will not justify "unreasonably exclusionary restrictions," *Timmons*, 520 U. S., at 367, we have "repeatedly upheld reasonable, politically neutral regulations" like Oklahoma's semiclosed primary law, *id.*, at 369 (internal quotation marks omitted).

## III

Beyond their challenge to Oklahoma's semiclosed primary law, § 1–104, respondents have expanded their challenge before this Court to include other Oklahoma election laws. Respondents contend that several of the State's ballot access and voter registration laws, taken together, severely burden their associational rights by effectively preventing them from changing their party affiliations in advance of a primary election. Brief for Respondents 15–18 (discussing the joint operation of Okla. Stat. Ann., Tit. 26, §§ 1–108, 1–109, 1–110, 4–112, and 4–119 (West Supp. 2005)).

Though the LPO has unsuccessfully challenged one of these provisions before, see *Rainbow Coalition of Okla.* v. *Oklahoma State Election Bd.*, 844 F. 2d 740 (CA10 1988) (rejecting First Amendment challenge by LPO and other political parties to Oklahoma's ballot access provision, § 1–108 (West 1981 and Supp. 1987)), respondents raise this argument for the first time in their brief on the merits to this Court. Before the District Court and the Court of Appeals, the only associational burden of which respondents complained was that imposed by § 1–104 (West 1997), *i. e.*, the need to disaffiliate from one party in order to vote in another party's primary. See, *e. g.*, Appellants' Opening Brief in No. 03–6058 (CA10), pp. 5, 8–10, 30 (challenging only § 1–104 as applied to respondents); Plaintiffs' Amended Trial Brief

9–25, Record Doc. 65 (same); Amended Complaint 6–9, *id.*, Doc. 23 (same). As a result, there is virtually no evidence in the record on how other electoral regulations operate in tandem with § 1–104, whether these other laws actually burden respondents' associational rights, and whether these laws advance important or even compelling state interests. We ordinarily do not consider claims neither raised nor decided below, *Cooper Industries, Inc.* v. *Aviall Services, Inc.*, 543 U. S. 157, 168–169 (2004) (citing *Adarand Constructors, Inc.* v. *Mineta*, 534 U. S. 103, 109 (2001) *(per curiam)*), and respondents have pointed to no unusual circumstances that would warrant considering other portions of Oklahoma's electoral code this late in the day, see *Taylor* v. *Freeland & Kronz*, 503 U. S. 638, 645–646 (1992). We therefore decline to consider this aspect of their challenge.

* * *

Oklahoma remains free to allow the LPO to invite registered voters of other parties to vote in its primary. But the Constitution leaves that choice to the democratic process, not to the courts. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings.

*It is so ordered.*

JUSTICE O'CONNOR, with whom JUSTICE BREYER joins except as to Part III, concurring in part and concurring in the judgment.

I join the Court's opinion except for Part II–A. Although I agree with most of the Court's reasoning, I write separately to emphasize two points. First, I think respondents' claim implicates important associational interests, and I see no reason to minimize those interests to dispose of this case. Second, I agree with the Court that only Oklahoma's semiclosed primary law is properly before us, that standing alone it imposes only a modest, nondiscriminatory burden on respondents' associational rights, and that this burden is justi-

fied by the State's legitimate regulatory interests. I note, however, that there are some grounds for concern that other state laws may unreasonably restrict voters' ability to change party registration so as to participate in the Libertarian Party of Oklahoma's (LPO) primary. A realistic assessment of regulatory burdens on associational rights would, in an appropriate case, require examination of the cumulative effects of the State's overall scheme governing primary elections; and any finding of a more severe burden would trigger more probing review of the justifications offered by the State.

I

Nearly every State in the Nation now mandates that political parties select their candidates for national or statewide office by means of primary elections. See Galderisi & Ezra, Congressional Primaries in Historical and Theoretical Context, in Congressional Primaries and the Politics of Representation 11, 17, and n. 34 (P. Galderisi, M. Ezra, & M. Lyons eds. 2001). Primaries constitute both a "'crucial juncture'" in the electoral process, *California Democratic Party* v. *Jones*, 530 U. S. 567, 575 (2000) (quoting *Tashjian* v. *Republican Party of Conn.*, 479 U. S. 208, 216 (1986)), and a vital forum for expressive association among voters and political parties, see *Kusper* v. *Pontikes*, 414 U. S. 51, 58 (1973) ("[A] basic function of a political party is to select the candidates for public office to be offered to the voters at general elections[, and a] prime objective of most voters in associating themselves with a particular party must surely be to gain a voice in that selection process"). It is here that the parties invite voters to join in selecting their standard bearers. The outcome is pivotal, of course, for it dictates the range of choices available at—and often the presumptive winner of—the general election.

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live," *Wesberry* v.

*Sanders*, 376 U. S. 1, 17 (1964), and "[t]he right to associate with the political party of one's choice is an integral part of this basic constitutional freedom," *Kusper*, *supra*, at 57. The Court has repeatedly reaffirmed that the First and Fourteenth Amendments protect the rights of voters and parties to associate through primary elections. See, *e. g.*, *California Democratic Party*, *supra*, at 574–575; *Tashjian*, *supra*, at 214; *Kusper*, *supra*, at 56–57. Indeed, constitutional protection of associational rights is especially important in this context because the aggregation of votes is, in some sense, the essence of the electoral process. To have a meaningful voice in this process, the individual voter must join together with like-minded others at the polls. And the choice of who will participate in selecting a party's candidate obviously plays a critical role in determining both the party's message and its prospects of success in the electoral contest. See *California Democratic Party*, *supra*, at 575; see also *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U. S. 107, 122 (1981) ("[T]he freedom to associate for the 'common advancement of political beliefs' necessarily presupposes the freedom to identify the people who constitute the association" (quoting *Kusper*, *supra*, at 56)).

The plurality questions whether the LPO and voters registered with another party have any constitutionally cognizable interest in associating with one another through the LPO's primary. See *ante*, at 588–589. Its doubts on this point appear to stem from two implicit premises: first, that a voter forms a cognizable association with a political party only by registering with that party; and second, that a voter can only form a cognizable association with one party at a time. Neither of these premises is sound, in my view. As to the first, registration with a political party surely may signify an important personal commitment, which may be accompanied by faithful voting and even activism beyond the polls. But for many voters, registration serves principally as a mandatory (and perhaps even ministerial) prerequisite

to participation in the party's primaries. The act of casting a ballot in a given primary may, for both the voter and the party, constitute a form of association that is at least as important as the act of registering. See *La Follette*, *supra*, at 130, n. 2 (Powell, J., dissenting) ("[T]he act of voting in the Democratic primary fairly can be described as an act of affiliation with the Democratic Party"). The fact that voting is episodic does not, in my judgment, undermine its associational significance; it simply reflects the special character of the electoral process, which allows citizens to join together at regular intervals to shape government through the choice of public officials.

As to the question of dual associations, I fail to see why registration with one party should negate a voter's First Amendment interest in associating with a second party. We surely would not say, for instance, that a registered Republican or Democrat has no protected interest in associating with the Libertarian Party by attending meetings or making political contributions. The validity of voters' and parties' interests in dual associations seems particularly clear where minor parties are concerned. For example, a voter may have a longstanding affiliation with a major party that she wishes to maintain, but she may nevertheless have a substantial interest in associating with a minor party during particular election cycles or in elections for particular offices. The voter's refusal to disaffiliate from the major party may reflect her abiding commitment to that party (which is not necessarily inconsistent with her desire to associate with a second party), the objective costs of disaffiliation, see, *e. g.*, *infra*, at 606–607, or both. The minor party, for its part, may have a significant interest in augmenting its voice in the political process by associating with sympathetic members of the major parties.

None of this is to suggest that the State does not have a superseding interest in restricting certain forms of association. We have never questioned, for example, the States'

authority to restrict voters' public registration to a single party or to limit each voter to participating in a single party's primary. But the fact that a State's regulatory authority may ultimately trump voters' or parties' associational interests in a particular context is no reason to dismiss the validity of those interests. As a more general matter, I question whether judicial inquiry into the genuineness, intensity, or duration of a given voter's association with a given party is a fruitful way to approach constitutional challenges to regulations like the one at issue here. Primary voting is an episodic and sometimes isolated act of association, but it is a vitally important one and should be entitled to some level of constitutional protection. Accordingly, where a party invites a voter to participate in its primary and the voter seeks to do so, we should begin with the premise that there are significant associational interests at stake. From this starting point, we can then ask to what extent and in what manner the State may justifiably restrict those interests.

## II

As to the remainder of the constitutional analysis, I am substantially in accord with the Court's reasoning. Our constitutional system assigns the States broad authority to regulate the electoral process, and we have recognized that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes," *Storer* v. *Brown*, 415 U. S. 724, 730 (1974). We have sought to balance the associational interests of parties and voters against the States' regulatory interests through the flexible standard of review reaffirmed by the Court today. See *ante*, at 586–587. Under that standard, "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick* v. *Takushi*, 504 U. S. 428, 434 (1992). Regulations

imposing severe burdens on associational rights must be narrowly tailored to advance a compelling government interest. *Timmons* v. *Twin Cities Area New Party*, 520 U. S. 351, 358 (1997). Regulations imposing lesser burdens are subject to less intensive scrutiny, and reasonable, nondiscriminatory restrictions ordinarily will be sustained if they serve important regulatory interests. *Ibid.*

This regime reflects the limited but important role of courts in reviewing electoral regulation. Although the State has a legitimate—and indeed critical—role to play in regulating elections, it must be recognized that it is not a wholly independent or neutral arbiter. Rather, the State is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit. Recognition of that basic reality need not render suspect most electoral regulations. Where the State imposes only reasonable and genuinely neutral restrictions on associational rights, there is no threat to the integrity of the electoral process and no apparent reason for judicial intervention. As such restrictions become more severe, however, and particularly where they have discriminatory effects, there is increasing cause for concern that those in power may be using electoral rules to erect barriers to electoral competition. In such cases, applying heightened scrutiny helps to ensure that such limitations are truly justified and that the State's asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions.

Throughout the proceedings in the lower courts, respondents framed their suit as a facial challenge to Oklahoma's semiclosed primary law. The sum of their argument was that, by requiring voters to register either as Libertarians or Independents in order to participate in the LPO's primary, state law imposes a severe and unjustified burden on the LPO's and Oklahoma voters' associational rights. For the reasons explained by the Court, *ante*, at 597–598, that is the

only claim properly before us. Assuming (as I believe we must under the circumstances) that Oklahoma provides reasonable avenues for voters to reregister as Independents or Libertarians, I agree with the Court that the semiclosed primary law imposes only a modest and politically neutral burden on associational rights. The burden is not altogether trivial: A voter with a significant commitment to a major party (for example) must forfeit registration with that party in order to participate in the LPO primary in any given election cycle, and the LPO cannot define the bounds of the association as broadly as it would like. See *post*, at 610, and n. 1 (STEVENS, J., dissenting); see also *supra*, at 601 (discussing the interest in dual associations). But neither is it severe or discriminatory.

Oklahoma's semiclosed primary law simply requires that voters wishing to participate in the LPO's primary do what they would have to do in order to participate in any other party's primary. By providing a reasonably fixed party-related electoral base from the close of registration until the date of the vote, this requirement facilitates campaign planning. And assuming the availability of reasonable reregistration procedures, a party's inability to persuade a voter to disaffiliate from a rival party would suggest not the presence of anticompetitive regulatory restrictions, but rather the party's failure to win the voter's allegiance. The semiclosed primary law, standing alone, does not impose a significant obstacle to participation in the LPO's primary, nor does it indicate partisan self dealing or a lockup of the political process that would warrant heightened judicial scrutiny.

For essentially the reasons explained by the Court, see *ante*, at 593–597, I agree that Oklahoma has a legitimate interest in requiring voters to disaffiliate from one party before participating in another party's primary. On the record before us, I also agree that the State's regulatory interests are adequate to justify the limited burden the semiclosed primary law imposes on respondents' freedom of association.

And finally, I agree that this case is distinguishable from *Tashjian*. See *ante*, at 591–593. I joined the dissent in that case, and I think the Court's application of strict scrutiny there is difficult to square with the flexible standard of review articulated in our more recent cases, see *supra*, at 602–603. But *Tashjian* is entitled to respect under principles of *stare decisis*, and it can be fairly distinguished on the grounds that the closed primary law in that case imposed a greater burden on associational interests than does Oklahoma's semiclosed primary law, see *ante*, at 592, while the State's regulatory interests in *Tashjian* were weaker than they are here, compare *ante*, at 593–597, with *Tashjian*, 479 U. S., at 217–225.

III

In briefing and oral argument before this Court, respondents raise for the first time the claim that Oklahoma's semiclosed primary law severely burdens their associational rights not through the law's own operation, but rather because *other* state laws make it quite difficult for voters to reregister as Independents or Libertarians so as to participate in the LPO primary. See Brief for Respondents 12–24. Respondents characterize Oklahoma's regulatory scheme as follows.

Partisan primaries in Oklahoma are held on the last Tuesday in July of each even-numbered year. Okla. Stat. Ann., Tit. 26, § 1–102 (West Supp. 2005). To field a party candidate in an election, the LPO must obtain "recognized" party status. See *ibid.*; see also §§ 1–107, 5–104 (West 1997 and Supp. 2005). This requires it to submit, no later than May 1 of any even-numbered year (*i. e.*, any election year), a petition with the signatures of registered voters equal to at least five percent of the total votes cast in the most recent gubernatorial or Presidential election. § 1–108 (West Supp. 2005). The State Election Board then has 30 days to determine whether the petition is sufficient. § 1–108(3). The LPO has attained recognized party status in this fashion in every Presidential

election year since 1980. However, unless the party's candidate receives at least 10 percent of the total votes cast for Governor or President in the general election (which no minor party has been able to do in any State in recent history), it loses recognized party status. § 1–109. To regain party status, the group must go through the petition process again. *Ibid.*

When a party loses its recognized status, as the LPO has after every general election in which it has participated, the affiliation of any voter registered with the party is changed to Independent. § 1–110. As the District Court noted, "it is highly likely that the ranks of independents, and, indeed, of registered Republicans and Democrats, contain numerous voters who sympathize with the LPO but who simply do not wish to go through the motions of re-registering every time they are purged from the rolls." Memorandum Opinion, Case No. CIV–00–1071–F (WD Okla., Jan. 24, 2003), App. to Pet. for Cert. A–48. And the Republican and Democratic Parties in Oklahoma, as it turns out, do not permit voters registered as Independents to participate in their primaries.

Most importantly, according to respondents, the deadline for changing party affiliation makes it quite difficult for the LPO to invite voters to reregister in order to participate in its primary. Assuming the LPO submits its petition for recognized party status on the May 1 deadline, the State has until May 31 to determine whether party status will be conferred. See Okla. Stat. Ann., Tit. 26, § 1–108 (West Supp. 2005). But in order to participate in the LPO primary, a voter registered with another party must change her party affiliation to Independent or Libertarian no later than June 1. See § 4–119. Moreover, no candidate for office is permitted officially to declare her candidacy with the State Election Board until the period between the first Monday in June and the next succeeding Wednesday. § 5–110.

If this characterization of state law is accurate, a registered Democrat or Republican sympathetic to the LPO or to

an LPO candidate in a given election year would seem to face a genuine dilemma. On the one hand, she may stick with her major party registration and forfeit the opportunity to participate in the LPO primary. Alternatively, she may reregister as a Libertarian or Independent, thus forfeiting her opportunity to participate in the major party primary, though no candidate will have officially declared yet and the voter may not yet know whether the LPO will even be permitted to conduct a primary. Moreover, she must make this choice roughly eight weeks before the primaries, at a time when most voters have not yet even tuned in to the election, much less decided upon a candidate. See *California Democratic Party*, 530 U. S., at 586 (KENNEDY, J., concurring). That might pose a special difficulty for voters attracted to minor party candidates, for whom support may not coalesce until comparatively late in the election cycle. See *Anderson* v. *Celebrezze*, 460 U. S. 780, 791–792 (1983) (discussing emergence of independent candidacies late in the election cycle).

Throughout the proceedings in the lower courts, which included a full bench trial before the District Court, respondents made no attempt to challenge these other electoral requirements or to argue that they were relevant to respondents' challenge to the semiclosed primary law. The lower courts, accordingly, gave little or no consideration to how these various regulations interrelate or operate in practice, nor did the State seek to justify them. Given this posture, I agree with the Court that it would be neither proper nor prudent for us to rule on the reformulated claim that respondents now urge. See *ante*, at 597–598.

Nevertheless, respondents' allegations are troubling, and, if they had been properly raised, the Court would want to examine the *cumulative* burdens imposed by the *overall* scheme of electoral regulations upon the rights of voters and parties to associate through primary elections. A panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely

restricting participation and competition. Even if each part of a regulatory regime might be upheld if challenged separately, one or another of these parts might have to fall if the overall scheme unreasonably curtails associational freedoms. Oklahoma's requirement that a voter register as an Independent or a Libertarian in order to participate in the LPO's primary is not itself unduly onerous; but that is true only to the extent that the State provides reasonable avenues through which a voter can change her registration status. The State's regulations governing changes in party affiliation are not properly before us now. But if it were shown, in an appropriate case, that such regulations imposed a weighty or discriminatory restriction on voters' ability to participate in the LPO's or some other party's primary, then more probing scrutiny of the State's justifications would be required.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, and with whom JUSTICE SOUTER joins as to Parts I, II, and III, dissenting.

The Court's decision today diminishes the value of two important rights protected by the First Amendment: the individual citizen's right to vote for the candidate of her choice and a political party's right to define its own mission. No one would contend that a citizen's membership in either the Republican or the Democratic Party could disqualify her from attending political functions sponsored by another party, or from voting for a third party's candidate in a general election. If a third party invites her to participate in its primary election, her right to support the candidate of her choice merits constitutional protection, whether she elects to make a speech, to donate funds, or to cast a ballot. The importance of vindicating that individual right far outweighs any public interest in punishing registered Republicans or Democrats for acts of disloyalty. The balance becomes even more lopsided when the individual right is

reinforced by the right of the Libertarian Party of Oklahoma (LPO) to associate with willing voters.

In concluding that the State's interests override those important values, the Court focuses on interests that are not legitimate. States do not have a valid interest in manipulating the outcome of elections, in protecting the major parties from competition, or in stunting the growth of new parties. While States do have a valid interest in conducting orderly elections and in encouraging the maximum participation of voters, neither of these interests overrides (or, indeed, even conflicts with) the valid interests of both the LPO and the voters who wish to participate in its primary.

In the final analysis, this case is simple. Occasionally, a political party's interest in defining its platform and its procedures for selecting and supporting its candidates conflicts with the voters' interest in participating in the selection of their elected representatives. If those values do conflict, we may be faced with difficult choices. But when, as in this case, those values reinforce one another a decision should be easy. Oklahoma has enacted a statute that impairs both; it denies a party the right to invite willing voters to participate in its primary elections. I would therefore affirm the Court of Appeals' judgment.

## I

In rejecting the individual respondents' claims, the majority focuses on their associational interests. While the voters in this case certainly have an interest in associating with the LPO, they are primarily interested in voting for a particular candidate, who happens to be in the LPO. Indeed, I think we have lost sight of the principal purpose of a primary: to nominate a candidate for office. Cf. *Burdick* v. *Takushi*, 504 U. S. 428, 445 (1992) (KENNEDY, J., dissenting) ("[T]he purpose of casting, counting, and recording votes is to elect public officials, not to serve as a general forum for political expression").

Because our recent cases have focused on the associational interest of voters, rather than the right to vote itself, it is important to identify three basic precepts. First, it is clear that the right to vote includes the right to vote in a primary election. See *United States* v. *Classic*, 313 U. S. 299, 318 (1941); *Terry* v. *Adams*, 345 U. S. 461 (1953). When the State makes the primary an "integral part of the procedure of choice," every eligible citizen's right to vote should receive the same protection as in the general election. *Classic*, 313 U. S., at 318; see also, *e. g.*, *Gray* v. *Sanders*, 372 U. S. 368 (1963) (invalidating primary system that diluted individual's vote in a primary). Second, the right to vote, whether in the primary or the general election, is the right to vote "for the candidate of one's choice." *Reynolds* v. *Sims*, 377 U. S. 533, 555 (1964). Finally, in assessing burdens on that right—burdens that are not limited to absolute denial of the right—we should focus on the realities of the situation, not on empty formalism. See *Classic*, 313 U. S., at 313 (identifying "the practical operation of the primary law"); *Terry*, 345 U. S., at 469–470 (noting that the Jaybird primary is "the only effective part" of the election process and examining "[t]he effect of the whole procedure" in determining whether the scheme violated the Fifteenth Amendment).

Here, the impact of the Oklahoma statute on the voters' right to vote for the candidate of their choosing is not a mere "burden"; it is a prohibition.[1] By virtue of the fact that their preferred candidate is a member of a different party, respondents are absolutely precluded from voting for him or her in the primary election. It is not an answer that the

[1] It is not enough that registered members of other parties may simply change their registration. See *ante*, at 590–591 (plurality opinion). Changing one's political party is not simply a matter of filing a form with the State; for many individuals it can be a significant decision. A view that party membership is merely a label demeans for many the personal significance of party identification and illustrates what little weight the majority actually gives to the associational interests in this case.

voters could participate in another primary (*i. e.*, the primary for the party with which they are registered) since the individual for whom they wish to vote is not a candidate in that primary. If the so-called "white primary" cases make anything clear, it is that the denial of the right to vote cannot be cured by the ability to participate in a subsequent or different election. Just as the "only election that has counted" in *Terry*, 345 U. S., at 469, was the Jaybird primary, since it was there that the public official was selected in any meaningful sense, the only primary that counts here is the one in which the candidate respondents want to vote for is actually running. See *Burdick*, 504 U. S., at 442 (KENNEDY, J., dissenting) ("Because [petitioner] could not write in the name of a candidate he preferred, he had no way to cast a meaningful vote").

This is not to say that voters have an absolute right to participate in whatever primary they desire. For instance, the parties themselves have a strong associational interest in determining which individuals may vote in their primaries, and that interest will normally outweigh the interest of the uninvited voter.[2] But in the ordinary case the State simply has no interest in classifying voters by their political party and in limiting the elections in which voters may participate as a result of that classification. Just as we held in *Reynolds* that all voters of a State stand in the same relation to the State regardless of where they live, and that the State must thus not make their vote count more or less depending

[2] The voters' interest may still prevail if, as was the case in *Terry* v. *Adams*, 345 U. S. 461 (1953), and *Smith* v. *Allwright*, 321 U. S. 649 (1944), the party primary is the *de facto* election. In part because of this Court's refusal to intervene in political gerrymandering cases, *Davis* v. *Bandemer*, 478 U. S. 109 (1986), an increasing number of districts are becoming "safe districts" in which one party effectively controls the outcome of the election. See, *e. g.*, Courtney, Redistricting: What the United States Can Learn from Canada, 3 Election L. J. 488 (2004) (concluding that 400 of the 435 Members of the House of Representatives were elected in safe districts in the 2002 election, 81 of whom ran unopposed).

upon that factor, 377 U. S., at 565, so too do citizens stand in the same relation *to the State* regardless of the political party to which they belong. The State may thus not deny them participation in a primary of a party that seeks their participation absent a state interest of overriding importance.

## II

In addition to burdening the individual respondent's right to vote, the Oklahoma scheme places a heavy burden on the LPO's associational rights. While Oklahoma permits independent voters to participate in the LPO's primary elections, it refuses to allow registered Republicans or Democrats to do so. That refusal has a direct impact on the LPO's selection of candidates for public office, the importance of which cannot be overstated. A primary election plays a critical role in enabling a party to disseminate its message to the public. *California Democratic Party* v. *Jones*, 530 U. S. 567, 575 (2000). It is through its candidates that a party is able to give voice to its political views, to engage other candidates on important issues of the day, and to affect change in the government of our society. Our cases "vigorously affirm the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.'" *Ibid.* (quoting *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U. S. 214, 224 (1989)).

The Oklahoma statute prohibits the LPO from associating with all of the voters it believes will best enable it to select a viable candidate. The ability to select those individuals with whom to associate is, of course, at the core of the First Amendment and goes to the heart of the associational interest itself. "Freedom of association means not only that an individual voter has the right to associate with the political party of her choice, but also that a political party has a right to identify the people who constitute the association . . . ."

*Ibid.* (internal quotation marks and citations omitted). See also *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U. S. 107, 122 (1981). While Libertarians can undoubtedly associate with Democrats and Republicans in other ways and at other times, the Oklahoma statute "limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community." *Tashjian* v. *Republican Party of Conn.*, 479 U. S. 208, 216 (1986).

In concluding that the Oklahoma statute is constitutional, the majority argues that associational interests between the LPO and registered members of other parties are either nonexistent or not heavily burdened by the Oklahoma scheme. The plurality relies on a single footnote in *Jones* to show that there are no associational interests between the LPO and registered Republicans and Democrats. See *ante*, at 588–589 (citing 530 U. S., at 573–574, n. 5). In *Jones*, of course, the political parties did not want voters of other parties participating in their primaries; the putative associational interest in this case, in which the LPO is actively courting voters of other parties, simply did not exist. More importantly, our decision in *Tashjian* rejected these arguments.

In *Tashjian* we held that the State could not prohibit Republicans from inviting voters who were not registered with a political party to participate in the Republican primary. We recognized that "[t]he Party's attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of association." 479 U. S., at 214. Importantly, we rejected the notion that the associational interest was somehow diminished because the voters the party sought to include were not formally registered as Republicans. *Id.*, at 215 ("[C]onsidered from the standpoint of the Party itself, the act of formal enrollment or public affiliation with the Party is merely one element in the continuum of participation in

Party affairs, and need not be in any sense the most important"). We reasoned that a State could not prohibit independents from contributing financial support to a Republican candidate or from participating in the party's events; it would be anomalous if it were able to prohibit participation by independents in the "'basic function'" of the party. *Id.*, at 216. Because of the importance of those interests, we carefully examined the interests asserted by the State, and finding them lacking, struck down the prohibition on independents' participation in the Republican primary.

Virtually identical interests are at stake in this case. It is the LPO's belief that attracting a more diverse group of voters in its primary would enable it to select a more mainstream candidate who would be more viable in the general election. Like the Republicans in *Tashjian*, the LPO is cognizant of the fact that in order to enjoy success at the voting booth it must have support from voters who identify themselves as independents, Republicans, or Democrats.

The LPO's desire to include Democrats and Republicans is undoubtedly informed by the fact that, given the stringent requirements of Oklahoma law, the LPO ceases to become a formally recognized party after each election cycle, and its members automatically revert to being independents.[3] Because the LPO routinely loses its status as a recognized party, many voters who might otherwise register as Libertarians instead register as Democrats or Republicans.[4] Thus, the LPO's interest in inviting registered Republicans

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[3] See Okla. Stat. Ann., Tit. 26, § 1–109 (West Supp. 2005) (requiring that a party's nominee for Governor, President, or Vice President receive 10% of the vote in a general election for the party to maintain its status).

[4] See App. to Pet. for Cert. A–48 (District Court recognizing that "it is highly likely that the ranks of independents and, indeed, of registered Republicans and Democrats, contain numerous voters who sympathize with the LPO but who simply do not wish to go through the motions of re-registering every time they are purged from the rolls").

and Democrats to participate in the selection of its standard bearer has even greater force than did the Republican Party's desire to invite independents to associate with it in *Tashjian*.

III

As justification for the State's abridgment of the constitutionally protected interests asserted by the LPO and the voters, the majority relies on countervailing state interests that are either irrelevant or insignificant. Neither separately nor in the aggregate do these interests support the Court's decision.

First, the Court makes the remarkable suggestion that by opening up its primary to Democrats and Republicans, the LPO will be saddled with so many nonlibertarian voters that the ultimate candidate will not be, in any sense, "libertarian." See *ante*, at 594.[5] But the LPO is *seeking* the crossover voting of Republicans and Democrats. Rightly or wrongly, the LPO feels that the best way to produce a viable candidate is to invite voters from other parties to participate in its primary. That may dilute what the Court believes to be the core of the Libertarian philosophy, but it is no business of the State to tell a political party what its message should be, how it should select its candidates, or how it should form coalitions to ensure electoral success. See *Jones*, 530 U. S., at 581–582 (rejecting state interests in producing candidates that are more centrist than the nominee the party would have selected absent the blanket primary).[6]

[5] Of course, as the majority recognizes, *ante*, at 594, since the number of independent voters overwhelms the number of registered-LPO voters, that is already the case.

[6] See also *Democratic Party of United States* v. *Wisconsin ex rel. La Follette*, 450 U. S. 107, 123–124 (1981) (State may not substitute its own judgment for that of the party); *Jones*, 530 U. S., at 587 (KENNEDY, J., concurring) ("A political party might be better served by allowing blanket primaries as a means of nominating candidates with broader appeal. Under the First Amendment's guarantee of speech through free associa-

Second, the majority expresses concern that crossover voting may create voter confusion. This paternalistic concern is belied by the District Court's finding that no significant voter confusion would occur. App. to Pet. for Cert. A–43 (noting that "very simple rules for voting eligibility can be posted at polling places when the primary and runoff elections are conducted").

Third, the majority suggests that crossover voting will impair the State's interest in properly classifying candidates and voters. As an empirical matter, a crossover voter may have a lesser commitment to the party with which he is registered if he votes in another party's primary. Nevertheless, the State does not have a valid interest in defining what it means to be a Republican or a Democrat, or in attempting to ensure the political orthodoxy of party members simply for the convenience of those parties. Cf. *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . "). Even if participation in the LPO's primary causes a voter to be a less committed "Democrat" or "Republican" (a proposition I reject[7]), the dilution of that commitment does not justify abridgment of the fundamental rights at issue in this case. While party identity is important in

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tion, however, *this is an issue for the party to resolve, not for the State*" (emphasis added)). Such coalition building, and reaching out to other groups to ensure a candidate gets elected, is a vital part of the political process. Cf. *Colorado Republican Federal Campaign Comm.* v. *Federal Election Comm'n*, 518 U. S. 604, 622–623 (1996) (citing W. Keefe, Parties, Politics, and Public Policy in America 59–74 (5th ed. 1988)).

[7] Allowing a potential crossover voter to vote in the LPO primary would not change the level of commitment he has toward his party of registration; it would simply give him an outlet to express the views he already holds.

our political system, it should not be immunized from the risk of change.[8]

Fourth, the majority argues that opening up the LPO primary to members of the Republican and Democratic Parties might interfere with electioneering and party-building efforts. It is clear, of course, that the majority here is concerned only with the Democratic and Republican Parties, since party building is precisely what the LPO is attempting to accomplish. Nevertheless, that concern is misplaced. Even if, as the majority claims, the Republican and Democratic voter rolls, mailing lists, and phone banks are not as accurate as they would otherwise be,[9] the administrative inconvenience of the major parties does not outweigh the right to vote or the associational interests of those voters and the LPO. At its core, this argument is based on a fear that the LPO might be successful in convincing Democratic or Republican voters to participate more fully in the LPO. Far from being a compelling interest, it is an impermissible one. *Timmons* v. *Twin Cities Area New Party*, 520 U. S. 351, 367

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[8] If, of course, States were able to protect the incumbent parties in the name of protecting the stability of the two-party system in general, we might still have the Federalists, the Anti-federalists, or the Whigs. See generally J. Aldrich, Why Parties? The Origin and Transformation of Political Parties in America (1995). In any event, we would not have the evolution of thought or policies that are occasioned through the change of political parties. While no such change has occurred in recent memory, that is no reason to ossify the status quo.

[9] The majority's argument is that voters who would otherwise vote in the Republican or Democratic primaries would vote in the LPO primary, and that the Democratic and Republican lists would not be an accurate indicator of who is likely to vote in those primaries, and of which voters to spend party resources on. First, I find it doubtful that those voters who vote in the LPO primary would have voted in the Democratic or Republican primary; rather, they probably would not have been sufficiently motivated to vote at all. Further, this would actually give Republicans and Democrats additional information as to which of their voters have Libertarian leanings.

(1997) (State may not "completely insulate the two-party system from minor parties' or independent candidates' competition and influence").

Finally, the majority warns against the possibility of raiding, *ante*, at 596, by which voters of another party maliciously vote in a primary in order to change the outcome of the primary, either to nominate a particularly weak candidate, a "sore-loser" candidate, or a candidate who would siphon votes from another party. The District Court, whose factual findings are entitled to substantial deference, found as a factual and legal matter that the State's argument concerning raiding was "unpersuasive." App. to Pet. for Cert. A–61.

Even if raiding were a possibility, however, the state interests are remote. The possibility of harm to the LPO itself is insufficient to overcome the LPO's associational rights. See *Eu*, 489 U. S., at 227–228 ("[E]ven if a ban on endorsements saves a political party from pursuing self-destructive acts, that would not justify a State substituting its judgment for that of the party"). If the LPO is willing to take the risk that its party may be "hijacked" by individuals who hold views opposite to their own, the State has little interest in second-guessing the LPO's decision.

With respect to the possibility that Democratic or Republican voters might raid the LPO to the detriment of their own or another party, neither the State nor the majority has identified any evidence that voters are sufficiently organized to achieve such a targeted result.[10] Such speculation is not, in

[10] To change the outcome of an election in a way that would benefit their own party, voters would have to be relatively certain that their preferred candidate in their own primary would win that primary and to vote in the LPO primary for a previously agreed-on candidate who is opposed to their own ideological preferences. Given that voters typically do not focus on an election until several days or weeks before an election, this prospect is unlikely. See *California Democratic Party* v. *Jones*, 530 U. S. 567, 586 (2000) (KENNEDY, J., concurring). Further, one would have expected to see some evidence of this in States where it is relatively easy to switch parties close to a primary.

my view, sufficient to override the real and acknowledged interest of the LPO and the voters who wish to participate in its primary. See *Timmons*, 520 U. S., at 375 (STEVENS, J., dissenting) (citing *Eu*, 489 U. S., at 226; *Anderson* v. *Celebrezze*, 460 U. S. 780, 789 (1983); and *Norman* v. *Reed*, 502 U. S. 279, 288–289 (1992)).[11]

In the end, the balance of interests clearly favors the LPO and those voters who wish to participate in its primary. The associational interests asserted—the right to select a standard bearer that the party thinks has the best chance of success, the ability to associate at the crucial juncture of selecting a candidate, and the desire to reach out to voters of other parties—are substantial and undoubtedly burdened by Oklahoma's statutory scheme. Any doubt about that fact is clearly answered by *Tashjian*. On the other side, the interests asserted by the State are either entirely speculative or simply protectionist measures that benefit the parties in power. No matter what the standard, they simply do not outweigh the interests of the LPO and its voters.

## IV

The Libertarian Party of Oklahoma is not the only loser in this litigation. Other minor parties and voters who have primary allegiance to one party but sometimes switch their support to rival candidates are also harmed by this decision. In my judgment, however, the real losers include all participants in the political market. Decisions that give undue def-

[11] The flimsy character of the state interests in this case confirms my view that today's decision rests primarily on a desire to protect the two-party system. In *Jones*, the Court concluded that the associational interests of the parties trumped state interests that were much more compelling than those asserted in this case. Here, by contrast, where the associational interests are being asserted by a minor party rather than by one of the dominant parties, the Court has reversed course and rejected those associational interests as insubstantial compared to the interests asserted by the State.

erence to the interest in preserving the two-party system,[12] like decisions that encourage partisan gerrymandering,[13] enhance the likelihood that so-called "safe districts" will play an increasingly predominant role in the electoral process. Primary elections are already replacing general elections as the most common method of actually determining the composition of our legislative bodies. The trend can only increase the bitter partisanship that has already poisoned some of those bodies that once provided inspiring examples of courteous adversary debate and deliberation.

The decision in this case, like the misguided decisions in *Timmons*, 520 U. S. 351, and *Jones*, 530 U. S. 567, attaches overriding importance to the interest in preserving the two-party system. In my view, there is over a century of experience demonstrating that the two major parties are fully capable of maintaining their own positions of dominance in the political marketplace without any special assistance from the state governments that they dominate or from this Court. Whenever they receive special advantages, the offsetting harm to independent voters may be far more significant than the majority recognizes.

In *Anderson*, 460 U. S. 780, we considered the impact of early filing dates on small political parties and independent candidates. Commenting on election laws that disadvantage independents, we noted:

> "By limiting the opportunities of independent-minded voters to associate in the electoral arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas. Historically political figures outside

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[12] Examples are cases permitting lengthy registration periods, *Rosario* v. *Rockefeller*, 410 U. S. 752 (1973), and cases approving bans on fusion candidates, *Timmons* v. *Twin Cities Area New Party*, 520 U. S. 351 (1997), and write-in candidates, *Burdick* v. *Takushi*, 504 U. S. 428 (1992).

[13] See, *e. g.*, *Vieth* v. *Jubelirer*, 541 U. S. 267 (2004); *Davis* v. *Bandemer*, 478 U. S. 109 (1986).

> the two major parties have been fertile sources of new ideas and new programs; many of their challenges to the status quo have in time made their way into the political mainstream. In short, the primary values protected by the First Amendment—'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,'—are served when election campaigns are not monopolized by the existing political parties." *Id.*, at 794 (citations omitted).

Because the Court's holding today has little to support it other than a naked interest in protecting the two major parties, I respectfully dissent.

Syllabus

# DECK *v.* MISSOURI

## CERTIORARI TO THE SUPREME COURT OF MISSOURI

No. 04–5293. Argued March 1, 2005—Decided May 23, 2005

Petitioner Deck was convicted of capital murder and sentenced to death, but the Missouri Supreme Court set aside the sentence. At his new sentencing proceeding, he was shackled with leg irons, handcuffs, and a belly chain. The trial court overruled counsel's objections to the shackles, and Deck was again sentenced to death. Affirming, the State Supreme Court rejected Deck's claim that his shackling violated, *inter alia*, the Federal Constitution.

*Held:* The Constitution forbids the use of visible shackles during a capital trial's penalty phase, as it does during the guilt phase, unless that use is "justified by an essential state interest"—such as courtroom security—specific to the defendant on trial. *Holbrook* v. *Flynn*, 475 U. S. 560, 568–569. Pp. 626–635.

(a) The law has long forbidden routine use of visible shackles during a capital trial's guilt phase, permitting shackling only in the presence of a special need. In light of *Holbrook*, *Illinois* v. *Allen*, 397 U. S. 337, early English cases, and lower court shackling doctrine dating back to the 19th century, it is now clear that this is a basic element of due process protected by the Federal Constitution. Thus, the Fifth and Fourteenth Amendments prohibit using physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that restraints are justified by a state interest specific to the particular defendant on trial. Pp. 626–629.

(b) If the reasons motivating the guilt phase constitutional rule—the presumption of innocence, securing a meaningful defense, and maintaining dignified proceedings—apply with like force at the penalty phase, the same rule will apply there. The latter two considerations obviously apply. As for the first, while the defendant's conviction means that the presumption of innocence no longer applies, shackles at the penalty phase threaten related concerns. The jury, though no longer deciding between guilt and innocence, is deciding between life and death, which, given the sanction's severity and finality, is no less important, *Monge* v. *California*, 524 U. S. 721, 732. Nor is accuracy in making that decision any less critical. Yet, the offender's appearance in shackles almost inevitably implies to a jury that court authorities consider him a danger to the community (which is often a statutory aggravator and always a relevant factor); almost inevitably affects adversely the jury's percep-

Syllabus

tion of the defendant's character; and thereby inevitably undermines the jury's ability to weigh accurately all relevant considerations when determining whether the defendant deserves death. The constitutional rule that courts cannot routinely place defendants in shackles or other restraints visible to the jury during the penalty phase is not absolute. In the judge's discretion, account may be taken of special circumstances in the case at hand, including security concerns, that may call for shackling in order to accommodate the important need to protect the courtroom and its occupants. Pp. 630–633.

(c) Missouri's arguments that its high court's decision in this case meets the Constitution's requirements are unconvincing. The first—that that court properly concluded that there was no evidence that the jury saw the restraints—is inconsistent with the record, which shows that the jury was aware of them, and overstates what the court actually said, which was that trial counsel made no record of the *extent* of the jury's awareness of the shackles. The second—that the trial court acted within its discretion—founders on the record, which does not clearly indicate that the judge weighted the particular circumstances of the case. The judge did not refer to an escape risk or threat to courtroom security or explain why, if shackles were necessary, he did not provide nonvisible ones as was apparently done during the guilt phase of this case. The third—that Deck suffered no prejudice—fails to take account of *Holbrook*'s statement that shackling is "inherently prejudicial," 475 U. S., at 568, a view rooted in this Court's belief that the practice will often have negative effects that "cannot be shown from a trial transcript," *Riggins* v. *Nevada*, 504 U. S. 127, 137. Thus, where a court, without adequate justification, orders the defendant to wear shackles visible to the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove "beyond a reasonable doubt that the [shackling] did not contribute to the verdict obtained." *Chapman* v. *California*, 386 U. S. 18, 24. Pp. 634–635.

136 S. W. 3d 481, reversed and remanded.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, and GINSBURG, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 635.

*Rosemary E. Percival* argued the cause and filed briefs for petitioner.

*Cheryl Caponegro Nield*, Assistant Attorney General of Missouri, argued the cause for respondent. With her on the

briefs were *Jeremiah W. (Jay) Nixon*, Attorney General, *James R. Layton*, State Solicitor, and *Evan J. Buchheim*, Assistant Attorney General.*

JUSTICE BREYER delivered the opinion of the Court.

We here consider whether shackling a convicted offender during the penalty phase of a capital case violates the Federal Constitution. We hold that the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, *unless* that use is "justified by an essential state interest"—such as the interest in courtroom security—specific to the defendant on trial. *Holbrook* v. *Flynn*, 475 U. S. 560, 568–569 (1986); see also *Illinois* v. *Allen*, 397 U. S. 337, 343–344 (1970).

I

In July 1996, petitioner Carman Deck robbed, shot, and killed an elderly couple. In 1998, the State of Missouri tried Deck for the murders and the robbery. At trial, state authorities required Deck to wear leg braces that apparently were not visible to the jury. App. 5; Tr. of Oral Arg. 21, 25,

*A brief of *amici curiae* urging affirmance was filed for the State of California et al. by *Bill Lockyer*, Attorney General of California, *Manuel M. Medeiros*, State Solicitor General, *Robert R. Anderson*, Chief Assistant Attorney General, *Mary Jo Graves*, Senior Assistant Attorney General, *Ward A. Campbell*, Supervising Deputy Attorney General, and *Catherine Chatman* and *Eric L. Christoffersen*, Deputy Attorneys General, by *John W. Suthers*, Interim Attorney General of Colorado, and by the Attorneys General for their respective States as follows: *Troy King* of Alabama, *M. Jane Brady* of Delaware, *Steve Carter* of Indiana, *Jim Hood* of Mississippi, *Mike McGrath* of Montana, *Jon Bruning* of Nebraska, *Brian Sandoval* of Nevada, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Henry D. McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *Jerry W. Kilgore* of Virginia, *Rob McKenna* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, and *Patrick J. Crank* of Wyoming.

*Thomas H. Speedy Rice* filed a brief for the Bar Human Rights Committee of England and Wales et al. as *amici curiae*.

29. Deck was convicted and sentenced to death. The State Supreme Court upheld Deck's conviction but set aside the sentence. 68 S. W. 3d 418, 432 (2002) (en banc). The State then held a new sentencing proceeding.

From the first day of the new proceeding, Deck was shackled with leg irons, handcuffs, and a belly chain. App. 58. Before the jury *voir dire* began, Deck's counsel objected to the shackles. The objection was overruled. *Ibid.*; see also *id.*, at 41–55. During the *voir dire*, Deck's counsel renewed the objection. The objection was again overruled, the court stating that Deck "has been convicted and will remain in legirons and a belly chain." *Id.*, at 58. After the *voir dire*, Deck's counsel once again objected, moving to strike the jury panel "because of the fact that Mr. Deck is shackled in front of the jury and makes them think that he is . . . violent today." *Id.*, at 58–59. The objection was again overruled, the court stating that his "being shackled takes any fear out of their minds." *Id.*, at 59. The penalty phase then proceeded with Deck in shackles. Deck was again sentenced to death. 136 S. W. 3d 481, 485 (Mo. 2004) (en banc).

On appeal, Deck claimed that his shackling violated both Missouri law and the Federal Constitution. The Missouri Supreme Court rejected these claims, writing that there was "no record of the extent of the jury's awareness of the restraints"; there was no "claim that the restraints impeded" Deck "from participating in the proceedings"; and there was "evidence" of "a risk" that Deck "might flee in that he was a repeat offender" who may have "killed his two victims to avoid being returned to custody." *Ibid.* Thus, there was "sufficient evidence in the record to support the trial court's exercise of its discretion" to require shackles, and in any event Deck "has not demonstrated that the outcome of his trial was prejudiced. . . . Neither being viewed in shackles by the venire panel prior to trial, nor being viewed while restrained throughout the entire trial, alone, is proof of prej-

udice." *Ibid.* The court rejected Deck's other claims of error and affirmed the sentence.

We granted certiorari to review Deck's claim that his shackling violated the Federal Constitution.

## II

We first consider whether, as a general matter, the Constitution permits a State to use visible shackles routinely in the guilt phase of a criminal trial. The answer is clear: The law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of a special need.

This rule has deep roots in the common law. In the 18th century, Blackstone wrote that "it is laid down in our antient books, that, though under an indictment of the highest nature," a defendant "must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape." 4 W. Blackstone, Commentaries on the Laws of England 317 (1769) (footnote omitted); see also 3 E. Coke, Institutes of the Laws of England *34 ("If felons come in judgement to answer, . . . they shall be out of irons, and all manner of bonds, so that their pain shall not take away any manner of reason, nor them constrain to answer, but at their free will"). Blackstone and other English authorities recognized that the rule did not apply at "the time of arraignment," or like proceedings before the judge. Blackstone, *supra*, at 317; see also *Trial of Christopher Layer*, 16 How. St. Tr. 94, 99 (K. B. 1722). It was meant to protect defendants appearing at trial before a jury. See *King* v. *Waite*, 1 Leach 28, 36, 168 Eng. Rep. 117, 120 (K. B. 1743) ("[B]eing put upon his trial, the Court immediately ordered [the defendant's] fetters to be knocked off").

American courts have traditionally followed Blackstone's "ancient" English rule, while making clear that "in extreme and exceptional cases, where the safe custody of the prisoner and the peace of the tribunal imperatively demand, the man-

acles may be retained." 1 J. Bishop, New Criminal Procedure § 955, p. 573 (4th ed. 1895); see also *id.*, at 572–573 ("[O]ne at the trial should have the unrestrained use of his reason, and all advantages, to clear his innocence. Our American courts adhere pretty closely to this doctrine" (internal quotation marks omitted)); *State* v. *Roberts*, 86 N. J. Super. 159, 163–165, 206 A. 2d 200, 203 (App. Div. 1965); *French* v. *State*, 377 P. 2d 501, 502–504 (Okla. Crim. App. 1962); *Eaddy* v. *People*, 115 Colo. 488, 490, 174 P. 2d 717, 718 (1946) (en banc); *State* v. *McKay*, 63 Nev. 118, 153–158, 165 P. 2d 389, 405–406 (1946); *Blaine* v. *United States*, 136 F. 2d 284, 285 (CADC 1943) *(per curiam)*; *Blair* v. *Commonwealth*, 171 Ky. 319, 327–329, 188 S. W. 390, 393 (App. 1916); *Hauser* v. *People*, 210 Ill. 253, 264–267, 71 N. E. 416, 421 (1904); *Parker* v. *Territory*, 5 Ariz. 283, 287, 52 P. 361, 363 (1898); *State* v. *Williams*, 18 Wash. 47, 48–50, 50 P. 580, 581 (1897); *Rainey* v. *State*, 20 Tex. App. 455, 472–473 (1886) (opinion of White, P. J.); *State* v. *Smith*, 11 Ore. 205, 8 P. 343 (1883); *Poe* v. *State*, 78 Tenn. 673, 674–678 (1882); *State* v. *Kring*, 64 Mo. 591, 592 (1877); *People* v. *Harrington*, 42 Cal. 165, 167 (1871); see also F. Wharton, Criminal Pleading and Practice § 540*a*, p. 369 (8th ed. 1880); 12 Cyclopedia of Law and Procedure 529 (1904). While these earlier courts disagreed about the degree of discretion to be afforded trial judges, see *post*, at 643–648 (THOMAS, J., dissenting), they settled virtually without exception on a basic rule embodying notions of fundamental fairness: Trial courts may not shackle defendants routinely, but only if there is a particular reason to do so.

More recently, this Court has suggested that a version of this rule forms part of the Fifth and Fourteenth Amendments' due process guarantee. Thirty-five years ago, when considering the trial of an unusually obstreperous criminal defendant, the Court held that the Constitution sometimes permitted special measures, including physical restraints. *Allen*, 397 U. S., at 343–344. The Court wrote that "binding

and gagging might possibly be the fairest and most reasonable way to handle" such a defendant. *Id.*, at 344. But the Court immediately added that "even to contemplate such a technique . . . arouses a feeling that no person should be tried while shackled and gagged except as a last resort." *Ibid.*

Sixteen years later, the Court considered a special courtroom security arrangement that involved having uniformed security personnel sit in the first row of the courtroom's spectator section. The Court held that the Constitution allowed the arrangement, stating that the deployment of security personnel during trial is not "the sort of inherently prejudicial practice that, like shackling, should be permitted only where justified by an essential state interest specific to each trial." *Holbrook*, 475 U. S., at 568–569. See also *Estelle* v. *Williams*, 425 U. S. 501, 503, 505 (1976) (making a defendant appear in prison garb poses such a threat to the "fairness of the factfinding process" that it must be justified by an "essential state policy").

Lower courts have treated these statements as setting forth a constitutional standard that embodies Blackstone's rule. Courts and commentators share close to a consensus that, during the guilt phase of a trial, a criminal defendant has a right to remain free of physical restraints that are visible to the jury; that the right has a constitutional dimension; but that the right may be overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum. See, *e. g.*, *Dyas* v. *Poole*, 309 F. 3d 586, 588–589 (CA9 2002) *(per curiam)*; *Harrell* v. *Israel*, 672 F. 2d 632, 635 (CA7 1982) *(per curiam)*; *State* v. *Herrick*, 324 Mont. 76, 78–82, 101 P. 3d 755, 757–759 (2004); *Hill* v. *Commonwealth*, 125 S. W. 3d 221, 233–234 (Ky. 2004); *State* v. *Turner*, 143 Wash. 2d 715, 723–727, 23 P. 3d 499, 504–505 (2001) (en banc); *Myers* v. *State*, 2000 OK CR 25, ¶ 19, 17 P. 3d 1021, 1033; *State* v. *Shoen*, 598 N. W. 2d 370, 374–377 (Minn. 1999); *Lovell* v. *State*, 347 Md. 623, 635–645,

702 A. 2d 261, 268–272 (1997); *People* v. *Jackson*, 14 Cal. App. 4th 1818, 1822–1830, 18 Cal. Rptr. 2d 586, 588–594 (1993); *Cooks* v. *State*, 844 S. W. 2d 697, 722 (Tex. Crim. App. 1992) (en banc); *State* v. *Tweedy*, 219 Conn. 489, 504–508, 594 A. 2d 906, 914–915 (1991); *State* v. *Crawford*, 99 Idaho 87, 93–98, 577 P. 2d 1135, 1141–1146 (1978); *People* v. *Brown*, 45 Ill. App. 3d 24, 26–28, 358 N. E. 2d 1362, 1363–1364 (1977); *State* v. *Tolley*, 290 N. C. 349, 362–371, 226 S. E. 2d 353, 365–369 (1976); see also 21A Am. Jur. 2d, Criminal Law §§ 1016, 1019 (1998); see generally Krauskopf, Physical Restraint of the Defendant in the Courtroom, 15 St. Louis U. L. J. 351 (1970–1971); ABA Standards for Criminal Justice: Discovery and Trial by Jury 15–3.2, pp. 188–191 (3d ed. 1996).

Lower courts have disagreed about the specific procedural steps a trial court must take prior to shackling, about the amount and type of evidence needed to justify restraints, and about what forms of prejudice might warrant a new trial, but they have not questioned the basic principle. They have emphasized the importance of preserving trial court discretion (reversing only in cases of clear abuse), but they have applied the limits on that discretion described in *Holbrook*, *Allen*, and the early English cases. In light of this precedent, and of a lower court consensus disapproving routine shackling dating back to the 19th century, it is clear that this Court's prior statements gave voice to a principle deeply embedded in the law. We now conclude that those statements identify a basic element of the "due process of law" protected by the Federal Constitution. Thus, the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial. Such a determination may of course take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial.

## III

We here consider shackling not during the guilt phase of an ordinary criminal trial, but during the punishment phase of a capital case. And we must decide whether that change of circumstance makes a constitutional difference. To do so, we examine the reasons that motivate the guilt-phase constitutional rule and determine whether they apply with similar force in this context.

### A

Judicial hostility to shackling may once primarily have reflected concern for the suffering—the "tortures" and "torments"—that "very painful" chains could cause. Krauskopf, *supra*, at 351, 353 (internal quotation marks omitted); see also *Riggins* v. *Nevada*, 504 U. S. 127, 154, n. 4 (1992) (THOMAS, J., dissenting) (citing English cases curbing the use of restraints). More recently, this Court's opinions have not stressed the need to prevent physical suffering (for not all modern physical restraints are painful). Instead they have emphasized the importance of giving effect to three fundamental legal principles.

First, the criminal process presumes that the defendant is innocent until proved guilty. *Coffin* v. *United States*, 156 U. S. 432, 453 (1895) (presumption of innocence "lies at the foundation of the administration of our criminal law"). Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process. Cf. *Estelle*, *supra*, at 503. It suggests to the jury that the justice system itself sees a "need to separate a defendant from the community at large." *Holbrook*, *supra*, at 569; cf. *State* v. *Roberts*, 86 N. J. Super., at 162, 206 A. 2d, at 202 ("[A] defendant 'ought not be brought to the Bar in a contumelious Manner; as with his Hands tied together, or any other Mark of Ignominy and Reproach . . . unless there be some Danger of a Rescous [rescue] or Escape'" (quoting 2 W. Hawkins, Pleas

of the Crown, ch. 28, § 1, p. 308 (1716–1721) (section on arraignments))).

Second, the Constitution, in order to help the accused secure a meaningful defense, provides him with a right to counsel. See, *e. g.*, Amdt. 6; *Gideon* v. *Wainwright*, 372 U. S. 335, 340–341 (1963). The use of physical restraints diminishes that right. Shackles can interfere with the accused's "ability to communicate" with his lawyer. *Allen*, 397 U. S., at 344. Indeed, they can interfere with a defendant's ability to participate in his own defense, say, by freely choosing whether to take the witness stand on his own behalf. Cf. *Cranburne's Case*, 13 How. St. Tr. 222 (K. B. 1696) ("Look you, keeper, you should take off the prisoners irons when they are at the bar, for they should stand at their ease when they are tried" (footnote omitted)); *People* v. *Harrington*, 42 Cal., at 168 (shackles "impos[e] physical burdens, pains, and restraints . . . , . . . ten[d] to confuse and embarrass" defendants' "mental faculties," and thereby tend "materially to abridge and prejudicially affect his constitutional rights").

Third, judges must seek to maintain a judicial process that is a dignified process. The courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment. And it reflects a seriousness of purpose that helps to explain the judicial system's power to inspire the confidence and to affect the behavior of a general public whose demands for justice our courts seek to serve. The routine use of shackles in the presence of juries would undermine these symbolic yet concrete objectives. As this Court has said, the use of shackles at trial "affront[s]" the "dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Allen*, *supra*, at 344; see also *Trial of Christopher Layer*, 16 How. St. Tr., at 99 (statement of Mr. Hungerford) ("[T]o have a man plead for his life" in shackles before

"a court of justice, the highest in the kingdom for criminal matters, where the king himself is supposed to be personally present," undermines the "dignity of the Court").

There will be cases, of course, where these perils of shackling are unavoidable. See *Allen*, *supra*, at 344. We do not underestimate the need to restrain dangerous defendants to prevent courtroom attacks, or the need to give trial courts latitude in making individualized security determinations. We are mindful of the tragedy that can result if judges are not able to protect themselves and their courtrooms. But given their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case.

B

The considerations that militate against the routine use of visible shackles during the guilt phase of a criminal trial apply with like force to penalty proceedings in capital cases. This is obviously so in respect to the latter two considerations mentioned, securing a meaningful defense and maintaining dignified proceedings. It is less obviously so in respect to the first consideration mentioned, for the defendant's conviction means that the presumption of innocence no longer applies. Hence shackles do not undermine the jury's effort to apply that presumption.

Nonetheless, shackles at the penalty phase threaten related concerns. Although the jury is no longer deciding between guilt and innocence, it is deciding between life and death. That decision, given the "'severity'" and "'finality'" of the sanction, is no less important than the decision about guilt. *Monge* v. *California*, 524 U. S. 721, 732 (1998) (quoting *Gardner* v. *Florida*, 430 U. S. 349, 357 (1977)).

Neither is accuracy in making that decision any less critical. The Court has stressed the "acute need" for reliable decisionmaking when the death penalty is at issue. *Monge*, *supra*, at 732 (citing *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978)

(plurality opinion)). The appearance of the offender during the penalty phase in shackles, however, almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community—often a statutory aggravator and nearly always a relevant factor in jury decisionmaking, even where the State does not specifically argue the point. Cf. Brief for Respondent 25–27. It also almost inevitably affects adversely the jury's perception of the character of the defendant. See *Zant* v. *Stephens*, 462 U. S. 862, 900 (1983) (REHNQUIST, J., concurring in judgment) (character and propensities of the defendant are part of a "unique, individualized judgment regarding the punishment that a particular person deserves"). And it thereby inevitably undermines the jury's ability to weigh accurately all relevant considerations—considerations that are often unquantifiable and elusive—when it determines whether a defendant deserves death. In these ways, the use of shackles can be a "thumb [on] death's side of the scale." *Sochor* v. *Florida*, 504 U. S. 527, 532 (1992) (internal quotation marks omitted); see also *Riggins*, 504 U. S., at 142 (KENNEDY, J., concurring in judgment) (through control of a defendant's appearance, the State can exert a "powerful influence on the outcome of the trial").

Given the presence of similarly weighty considerations, we must conclude that courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding. The constitutional requirement, however, is not absolute. It permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns, that may call for shackling. In so doing, it accommodates the important need to protect the courtroom and its occupants. But any such determination must be case specific; that is to say, it should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial.

## IV

Missouri claims that the decision of its high court meets the Constitution's requirements in this case. It argues that the Missouri Supreme Court properly found: (1) that the record lacks evidence that the jury saw the restraints; (2) that the trial court acted within its discretion; and, in any event, (3) that the defendant suffered no prejudice. We find these arguments unconvincing.

The first argument is inconsistent with the record in this case, which makes clear that the jury was aware of the shackles. See App. 58–59 (Deck's attorney stated on the record that "Mr. Deck [was] shackled *in front of the jury*" (emphasis added)); *id.*, at 59 (trial court responded that "him being shackled takes any fear out of their minds"). The argument also overstates the Missouri Supreme Court's holding. The court said: "Trial counsel made no record *of the extent* of the jury's awareness of the restraints throughout the penalty phase, and Appellant does not claim that the restraints impeded him from participating in the proceedings." 136 S. W. 3d, at 485 (emphasis added). This statement does not suggest that the jury was unaware of the restraints. Rather, it refers to the degree of the jury's awareness, and hence to the kinds of prejudice that might have occurred.

The second argument—that the trial court acted within its discretion—founders on the record's failure to indicate that the trial judge saw the matter as one calling for discretion. The record contains no formal or informal findings. Cf. *supra*, at 632 (requiring a case-by-case determination). The judge did not refer to a risk of escape—a risk the State has raised in this Court, see Tr. of Oral Arg. 36–37—or a threat to courtroom security. Rather, he gave as his reason for imposing the shackles the fact that Deck already "has been convicted." App. 58. While he also said that the shackles would "tak[e] any fear out of" the juror's "minds," he nowhere explained any special reason for fear. *Id.*, at 59. Nor did he explain why, if shackles were necessary, he chose

not to provide for shackles that the jury could not see—apparently the arrangement used at trial. If there is an exceptional case where the record itself makes clear that there are indisputably good reasons for shackling, it is not this one.

The third argument fails to take account of this Court's statement in *Holbrook* that shackling is "inherently prejudicial." 475 U. S., at 568. That statement is rooted in our belief that the practice will often have negative effects, but—like "the consequences of compelling a defendant to wear prison clothing" or of forcing him to stand trial while medicated—those effects "cannot be shown from a trial transcript." *Riggins, supra,* at 137. Thus, where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation. The State must prove "beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained." *Chapman* v. *California,* 386 U. S. 18, 24 (1967).

V

For these reasons, the judgment of the Missouri Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

Carman Deck was convicted of murdering and robbing an elderly couple. He stood before the sentencing jury not as an innocent man, but as a convicted double murderer and robber. Today this Court holds that Deck's due process rights were violated when he appeared at sentencing in leg irons, handcuffs, and a belly chain. The Court holds that such restraints may only be used where the use is "'justified by an essential state interest'" that is "specific to the defend-

ant on trial," *ante*, at 624, and that is supported by specific findings by the trial court. Tradition—either at English common law or among the States—does not support this conclusion. To reach its result, the Court resurrects an old rule the basis for which no longer exists. It then needlessly extends the rule from trials to sentencing. In doing so, the Court pays only superficial heed to the practice of States and gives conclusive force to errant dicta sprinkled in a trio of this Court's cases. The Court's holding defies common sense and all but ignores the serious security issues facing our courts. I therefore respectfully dissent.

## I

Carman Deck and his sister went to the home of Zelma and James Long on a summer evening in 1996. After waiting for nightfall, Deck and his sister knocked on the door of the Longs' home, and when Mrs. Long answered, they asked for directions. Mrs. Long invited them in, and she and Mr. Long assisted them with directions. When Deck moved toward the door to leave, he drew a pistol, pointed it at the Longs, and ordered them to lie face down on their bed. The Longs did so, offering up money and valuables throughout the house and all the while begging that he not harm them.

After Deck finished robbing their house, he stood at the edge of their bed, deliberating for 10 minutes over whether to spare them. He ignored their pleas and shot them each twice in the head. Deck later told police that he shot the Longs because he thought that they would be able to recognize him.

Deck was convicted of the murders and robbery of the Longs and sentenced to death. The death sentence was overturned on appeal. Deck then had another sentencing hearing, at which he appeared in leg irons, a belly chain, and handcuffs. At the hearing, the jury heard evidence of Deck's numerous burglary and theft convictions and his assistance in a jailbreak by two prisoners.

On resentencing, the jury unanimously found six aggravating factors: Deck committed the murders while engaged in the commission of another unlawful homicide; Deck murdered each victim for the purpose of pecuniary gain; each murder involved depravity of mind; each murder was committed for the purpose of avoiding a lawful arrest; each murder was committed while Deck was engaged in a burglary; and each murder was committed while Deck was engaged in a robbery. The jury recommended, and the trial court imposed, two death sentences.

Deck sought postconviction relief from his sentence, asserting, among other things, that his due process and equal protection rights were violated by the trial court's requirement that he appear in shackles. The Missouri Supreme Court rejected that claim. 136 S. W. 3d 481 (2004) (en banc). The court reasoned that "there was a risk that [Deck] might flee in that he was a repeat offender and evidence from the guilt phase of his trial indicated that he killed his two victims to avoid being returned to custody," and thus it could not conclude that the trial court had abused its discretion. *Id.*, at 485.

## II

My legal obligation is not to determine the wisdom or the desirability of shackling defendants, but to decide a purely legal question: Does the Due Process Clause of the Fourteenth Amendment preclude the visible shackling of a defendant? Therefore, I examine whether there is a deeply rooted legal principle that bars that practice. *Medina* v. *California*, 505 U. S. 437, 446 (1992); *Apprendi* v. *New Jersey*, 530 U. S. 466, 500 (2000) (THOMAS, J., concurring); see also *Chicago* v. *Morales*, 527 U. S. 41, 102–106 (1999) (THOMAS, J., dissenting). As I explain below, although the English common law had a rule against trying a defendant in irons, the basis for the rule makes clear that it should not be extended by rote to modern restraints, which are dissimilar in certain essential respects to the irons that gave rise to

the rule. Despite the existence of a rule at common law, state courts did not even begin to address the use of physical restraints until the 1870's, and the vast majority of state courts would not take up this issue until the 20th century, well after the ratification of the Fourteenth Amendment. Neither the earliest case nor the more modern cases reflect a consensus that would inform our understanding of the requirements of due process. I therefore find this evidence inconclusive.

A

English common law in the 17th and 18th centuries recognized a rule against bringing the defendant in irons to the bar for trial. See, *e. g.*, 4 W. Blackstone, Commentaries on the Laws of England 317 (1769); 3 Coke, Institutes of the Laws of England *34 (hereinafter Coke). This rule stemmed from none of the concerns to which the Court points, *ante*, at 630–633—the presumption of innocence, the right to counsel, concerns about decorum, or accuracy in decisionmaking. Instead, the rule ensured that a defendant was not so distracted by physical pain during his trial that he could not defend himself. As one source states, the rule prevented prisoners from "any Torture while they ma[de] their defence, be their Crime never so great." J. Kelyng, A Report of Divers Cases in Pleas of the Crown 10 (1708).[1] This concern was understandable, for the irons of that period were heavy and painful. In fact, leather strips often lined the irons to prevent them from rubbing away a defendant's

[1] See Coke *34 ("If felons come in judgement to answer, . . . they shall be out of irons, and all manner of bonds, so that their pain shall not take away any manner of reason, nor them constrain to answer, but at their free will"); *Cranburne's Case*, 13 How. St. Tr. 222 (K. B. 1696) (prisoners "should stand at their ease when they are tried"); The Conductor Generalis 403 (J. Parker ed. 1801) (reciting same); cf. *ibid.* ("[t]hat where the law requires that a prisoner should be kept in *salva & arcta custodia*, yet that must be without pain or torment to the prisoner").

skin. T. Gross, Manacles of the World: A Collector's Guide to International Handcuffs, Leg Irons and other Miscellaneous Shackles and Restraints 25 (1997). Despite Coke's admonition that "[i]t [was] an abuse that prisoners be chained with irons, or put to any pain before they be attained," Coke *34, suspected criminals often wore irons during pretrial confinement, J. Langbein, The Origins of Adversary Criminal Trial 50, and n. 197 (2003) (hereinafter Langbein). For example, prior to his trial in 1722 for treason, Christopher Layer spent his confinement in irons. Layer's counsel urged that his irons be struck off, for they allowed him to "sleep but in one posture." *Trial of Christopher Layer*, 16 How. St. Tr. 94, 98 (K. B. 1722).

The concern that felony defendants not be in severe pain at trial was acute because, before the 1730's, defendants were not permitted to have the assistance of counsel at trial, with an early exception made for those charged with treason. Langbein 170–172. Instead, the trial was an "'accused speaks'" trial, at which the accused defended himself. The accused was compelled to respond to the witnesses, making him the primary source of information at trial. *Id.*, at 48; see also *Faretta* v. *California*, 422 U. S. 806, 823–824 (1975). As the Court acknowledges, *ante*, at 626, the rule against shackling did not extend to arraignment.[2] A defendant remained in irons at arraignment because "he [was] only called upon to plead by *advice of his counsel*"; he was not on trial,

[2] When arraignment and trial occurred on separate occasions, the defendant could be brought to his arraignment in irons. *Trial of Christopher Layer*, 16 How. St. Tr. 94, 97 (K. B. 1722) (defendant arraigned in irons); *King* v. *Waite*, 1 Leach 28, 36, 168 Eng. Rep. 117, 120 (K. B. 1743) (fetters could not be removed until the defendant had pleaded); but cf. R. Burns, Abridgment, or the American Justice 37 (1792) ("The prisoner on his arraignment . . . must be brought to the bar without irons and all manner of shackles or bonds, unless there be a danger of escape, and then he may be brought with irons").

where he would play the main role in defending himself. *Trial of Christopher Layer*, *supra*, at 100 (emphasis added).

A modern-day defendant does not spend his pretrial confinement wearing restraints. The belly chain and handcuffs are of modest, if not insignificant, weight. Neither they nor the leg irons cause pain or suffering, let alone pain or suffering that would interfere with a defendant's ability to assist in his defense at trial. And they need not interfere with a defendant's ability to assist his counsel—a defendant remains free to talk with counsel during trial, and restraints can be employed so as to ensure that a defendant can write to his counsel during the trial. Restraints can also easily be removed when a defendant testifies, so that any concerns about testifying can be ameliorated. Modern restraints are therefore unlike those that gave rise to the traditional rule.

The Court concedes that modern restraints are nothing like the restraints of long ago, *ante*, at 630, and even that the rule at common law did not rest on any of the "three fundamental legal principles" the Court posits to support its new rule, *ibid.* Yet the Court treats old and modern restraints as similar for constitutional purposes merely because they are both types of physical restraints. This logical leap ignores that modern restraints do not violate the principle animating the common-law rule. In making this leap, the Court strays from the appropriate legal inquiry of examining common-law traditions to inform our understanding of the Due Process Clause.

B

In the absence of a common-law rule that applies to modern-day restraints, state practice is also relevant to determining whether a deeply rooted tradition supports the conclusion that the Fourteenth Amendment's Due Process Clause limits shackling. See *Morales*, 527 U. S., at 102–106 (THOMAS, J., dissenting). The practice among the States, however, does not support, let alone require, the conclusion

that shackling can be done only where "particular concerns . . . related to the defendant on trial" are articulated as findings in the record. *Ante*, at 633. First, state practice is of modern, not longstanding, vintage. The vast majority of States did not address the issue of physical restraints on defendants during trial until the 20th century. Second, the state cases—both the earliest to address shackling and even the later cases—reflect substantial differences that undermine the contention that the Due Process Clause so limits the use of physical restraints. Third, state- and lower federal-court cases decided after *Illinois* v. *Allen*, 397 U. S. 337 (1970), *Estelle* v. *Williams*, 425 U. S. 501 (1976), and *Holbrook* v. *Flynn*, 475 U. S. 560 (1986), are not evidence of a current consensus about the use of physical restraints. Such cases are but a reflection of the dicta contained in *Allen*, *Estelle*, and *Holbrook*.

1

State practice against shackling defendants was established in the 20th century. In 35 States, no recorded state-court decision on the issue appears until the 20th century.[3]

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[3] *State* v. *Mitchell*, 824 P. 2d 469, 473–474 (Utah App. 1991); *Smith* v. *State*, 773 P. 2d 139, 140–141 (Wyo. 1989); *Frye* v. *Commonwealth*, 231 Va. 370, 381–382, 345 S. E. 2d 267, 276 (1986); *State* v. *White*, 456 A. 2d 13, 15 (Me. 1983); *State* v. *Baugh*, 174 Mont. 456, 462–463, 571 P. 2d 779, 782–783 (1977); *Brookins* v. *State*, 354 A. 2d 422, 425 (Del. 1976); *State* v. *Phifer*, 290 N. C. 203, 219, 225 S. E. 2d 786, 797 (1976); *State* v. *Lemire*, 115 N. H. 526, 531, 345 A. 2d 906, 910 (1975); *Anthony* v. *State*, 521 P. 2d 486, 496 (Alaska 1974); *State* v. *Palmigiano*, 112 R. I. 348, 357–358, 309 A. 2d 855, 861 (1973); *Jones* v. *State*, 11 Md. App. 686, 693–694, 276 A. 2d 666, 670 (1971); *State* v. *Polidor*, 130 Vt. 34, 39, 285 A. 2d 770, 773 (1971); *State* v. *Moen*, 94 Idaho 477, 479–480, 491 P. 2d 858, 860–861 (1971); *State* v. *Yurk*, 203 Kan. 629, 631, 456 P. 2d 11, 13–14 (1969); *People* v. *Thomas*, 1 Mich. App. 118, 126, 134 N. W. 2d 352, 357 (1965); *State* v. *Nutley*, 24 Wis. 2d 527, 564–565, 129 N. W. 2d 155, 171 (1964), overruled on other grounds by *State* v. *Stevens*, 26 Wis. 2d 451, 463, 132 N. W. 2d 502, 508 (1965); *State* v. *Brooks*, 44 Haw. 82, 84–86, 352 P. 2d 611, 613–614 (1960); *State* v. *Coursolle*,

Of those 35 States, 21 States have no recorded decision on the question until the 1950's or later.[4] The 14 state (including then-territorial) courts that addressed the matter before the 20th century only began to do so in the 1870's.[5] The

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255 Minn. 384, 389, 97 N. W. 2d 472, 476–477 (1959) (handcuffing of witnesses); *Allbright* v. *State*, 92 Ga. App. 251, 252–253, 88 S. E. 2d 468, 469–470 (1955); *State* v. *Roscus*, 16 N. J. 415, 428, 109 A. 2d 1, 8 (1954); *People* v. *Snyder*, 305 N. Y. 790, 791, 113 N. E. 2d 302 (1953); *Eaddy* v. *People*, 115 Colo. 488, 491, 174 P. 2d 717, 718 (1946) (en banc); *State* v. *McKay*, 63 Nev. 118, 161–163, 165 P. 2d 389, 408–409 (1946) (also discussing a 1929 Nevada statute that limited the use of restraints prior to conviction); *Rayburn* v. *State*, 200 Ark. 914, 920–922, 141 S. W. 2d 532, 535–536 (1940); *Shultz* v. *State*, 131 Fla. 757, 758, 179 So. 764, 765 (1938); *Commonwealth* v. *Millen*, 289 Mass. 441, 477–478, 194 N. E. 463, 480 (1935); *Pierpont* v. *State*, 49 Ohio App. 77, 83–84, 195 N. E. 264, 266–267 (1934); *Corey* v. *State*, 126 Conn. 41, 42–43, 9 A. 2d 283, 283–284 (1939); *Bradbury* v. *State*, 51 Okla. Cr. 56, 59–61, 299 P. 510, 512 (App. 1931); *State* v. *Hanrahan*, 49 S. D. 434, 435–437, 207 N. W. 224, 225 (1926); *South* v. *State*, 111 Neb. 383, 384–386, 196 N. W. 684, 685–686 (1923); *Blair* v. *Commonwealth*, 171 Ky. 319, 327, 188 S. W. 390, 393 (1916); *McPherson* v. *State*, 178 Ind. 583, 584–585, 99 N. E. 984, 985 (1912); *State* v. *Kenny*, 77 S. C. 236, 240–241, 57 S. E. 859, 861 (1907); *State* v. *Bone*, 114 Iowa 537, 541–543, 87 N. W. 507, 509 (1901). The North Dakota courts have yet to pass upon the question in any reported decision.

[4] See n. 3, *supra*. It bears noting, however, that in 1817 Georgia enacted a statute limiting the use of physical restraints on defendants at trial, long before any decision was reported in the Georgia courts. Prince's Digest of the Laws of the State of Georgia § 21, p. 372 (1822). Its courts did not address shackling until 1955. *Allbright* v. *State*, *supra*, at 252–253, 88 S. E. 2d, at 469–470.

[5] *Parker* v. *Territory*, 5 Ariz. 283, 287–288, 52 P. 361, 363 (1898); *State* v. *Allen*, 45 W. Va. 65, 68–70, 30 S. E. 209, 210–211 (1898), overruled in relevant part, *State* v. *Brewster*, 164 W. Va. 173, 182, 261 S. E. 2d 77, 82 (1979) (relying on *Illinois* v. *Allen*, 397 U. S. 337 (1970), and *Estelle* v. *Williams*, 425 U. S. 501 (1976)); *State* v. *Williams*, 18 Wash. 47, 50–51, 50 P. 580, 581–582 (1897); *Commonwealth* v. *Weber*, 167 Pa. 153, 165–166, 31 A. 481, 484 (1895); *Rainey* v. *State*, 20 Tex. Ct. App. 455, 472 (1886); *Upstone* v. *People*, 109 Ill. 169, 179 (1883); *State* v. *Thomas*, 35 La. Ann. 24, 26 (1883); *State* v. *Smith*, 11 Ore. 205, 208, 8 P. 343 (1883); *Territory* v. *Kelly*, 2 N. M. 292, 304–306 (1882); *Poe* v. *State*, 78 Tenn. 673, 677–678 (1882); *Faire* v.

California Supreme Court's decision in *People* v. *Harrington*, 42 Cal. 165 (1871), "seems to have been the first case in this country where this ancient rule of the common law was considered and enforced." *State* v. *Smith*, 11 Ore. 205, 208, 8 P. 343 (1883). The practice in the United States is thus of contemporary vintage. State practice that was only nascent in the late 19th century is not evidence of a consistent unbroken tradition dating to the common law, as the Court suggests. *Ante*, at 626–627. The Court does not even attempt to account for the century of virtual silence between the practice established at English common law and the emergence of the rule in the United States. Moreover, the belated and varied state practice is insufficient to warrant the conclusion that shackling of a defendant violates his due process rights. See *Martinez* v. *Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U. S. 152, 159 (2000) (where no history of a right to appeal much before the 20th century, no historical support for a right to self-representation on appeal).

2

The earliest state cases reveal courts' divergent views of visible shackling, undermining the notion that due process cabins shackling to cases in which "particular concerns . . . related to the defendant on trial" are supported by findings on the record. *Ante*, at 633.

The Supreme Court of the New Mexico Territory held that great deference was to be accorded the trial court's decision to put the defendant in shackles, permitting a reviewing court to presume that there had been a basis for doing so if the record lay silent. *Territory* v. *Kelly*, 2 N. M. 292, 304–306 (1882). Only if the record "affirmatively" showed "no

*State*, 58 Ala. 74, 80–81 (1877); *State* v. *Kring*, 1 Mo. App. 438, 441–442 (1876); *Lee* v. *State*, 51 Miss. 566, 569–574 (1875), overruled on other grounds, *Wingo* v. *State*, 62 Miss. 311, 315–316 (1884); *People* v. *Harrington*, 42 Cal. 165, 168–169 (1871).

reason whatever" for shackling was the decision to shackle a defendant erroneous. *Ibid.*; see *State* v. *Allen*, 45 W. Va. 65, 68–70, 30 S. E. 209, 211 (1898) (following *Kelly*), overruled in relevant part, *State* v. *Brewster*, 164 W. Va. 173, 182, 261 S. E. 2d 77, 82 (1979). The Alabama Supreme Court also left the issue to the trial court's discretion and went so far as to bar any appeal from the trial court's decision to restrain the defendant. *Faire* v. *State*, 58 Ala. 74, 80–81 (1877); see *Poe* v. *State*, 78 Tenn. 673, 677 (1882) (decision to manacle a defendant during trial "left to the sound discretion of the trial court" and subject to abuse-of-discretion standard of review). Mississippi concluded that the decision to shackle a defendant "may be safely committed to courts and sheriffs, whose acts are alike open to review in the courts and at the ballot box."[6] *Lee* v. *State*, 51 Miss. 566, 574 (1875), overruled on other grounds, *Wingo* v. *State*, 62 Miss. 311 (1884).

By contrast, California, Missouri, Washington, and Oregon adopted more restrictive approaches. In *People* v. *Harrington*, *supra*, the California Supreme Court held that shackling a defendant "without evident necessity" of any kind violated the common-law rule as well as state law and was prejudicial to the defendant. *Id.*, at 168–169. A few years later, the Missouri courts took an even more restrictive view, concluding that the use of shackles or other such restraints was permitted only if warranted by the defendant's conduct "at the time of the trial." *State* v. *Kring*, 64 Mo. 591, 593 (1877); see *State* v. *Smith*, *supra*, at 207–208, 8 P., at 343 (following *Kring* and *Harrington* without discussion); *State* v. *Williams*, 18 Wash. 47, 50–51, 50 P. 580, 581–582 (1897) (adopting *Kring*'s test).

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[6] Pennsylvania first addressed the question of the shackling of a defendant in the context of a grand jury proceeding. It too concluded that deference was required, finding that the appropriate security for the defendant's transport was best left to the officers guarding him. *Commonwealth* v. *Weber*, *supra*, at 165, 31 A., at 484.

Texas took an intermediate position. The Texas Court of Appeals relied on *Kring*, and at the same time deferred to the decision made by the sheriff to bring the defendant into the courtroom in shackles. See *Rainey* v. *State*, 20 Tex. Ct. App. 455, 472 (1886); see also *Parker* v. *Territory*, 5 Ariz. 283, 287–288, 52 P. 361, 363 (1898) (following *Harrington* but permitting the shackling of a defendant at arraignment based on the crime for which he had been arrested as well as the reward that had been offered for his recapture).

Thus, in the late 19th century States agreed that generally defendants ought to come to trial unfettered, but they disagreed over the breadth of discretion to be afforded trial courts. A bare majority of States required that trial courts and even jailers be given great leeway in determining when a defendant should be restrained; a minority of States severely constrained such discretion, in some instances by limiting the information that could be considered; and an even smaller set of States took an intermediate position. While the most restrictive view adopted by States is perhaps consistent with the rule Deck seeks, the majority view is flatly inconsistent with requiring a State to show, and for a trial court to set forth, findings of an "'essential state interest'" "specific to the defendant on trial" before shackling a defendant. *Ante*, at 624. In short, there was no consensus that supports elevating the rule against shackling to a federal constitutional command.

3

The modern cases provide no more warrant for the Court's approach than do the earliest cases. The practice in the 20th century did not resolve the divisions among States that emerged in the 19th century. As more States addressed the issue, they continued to express a general preference that defendants be brought to trial without shackles. They continued, however, to disagree about the latitude to be given trial courts. Many deferred to the judgment of the trial

court,[7] and some to the views of those responsible for guarding the defendant.[8] States also continued to disagree over whether the use of shackles was inherently prejudicial.[9] Moreover, States differed over the information that could

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[7] See, *e. g.*, *State* v. *Franklin*, 97 Ohio St. 3d 1, 18–19, 776 N. E. 2d 26, 46 (2002) (decision to shackle a defendant is left to the sound discretion of a trial court); *Commonwealth* v. *Agiasottelis*, 336 Mass. 12, 16, 142 N. E. 2d 386, 389 (1957) ("[A] judge properly should be reluctant to interfere with reasonable precautions which a sheriff deems necessary to keep secure prisoners for whose custody he is responsible and, if a judge fails to require removal of shackles, his exercise of a sound discretion will be sustained"); *Rayburn* v. *State*, 200 Ark., at 920–921, 141 S. W. 2d, at 536 ("Trial Courts must be allowed a discretion as to the precautions which they will permit officers . . . to take to prevent the prisoner's escape, or to prevent him from harming any person connected with the trial, or from being harmed"); *State* v. *Hanrahan*, 49 S. D., at 436, 207 N. W., at 225 ("It is the universal rule that while no unreasonable restraint may be exercised over the defendant during his trial, yet it is within the discretion of the trial court to determine what is and what is not reasonable restraint"); *McPherson* v. *State*, 178 Ind., at 585, 99 N. E., at 985 ("[W]hether it is necessary for a prisoner to be restrained by shackles or manacles during the trial must be left to the sound discretion of the trial judge").

[8] See, *e. g.*, *Commonwealth* v. *Millen*, 289 Mass., at 477–478, 194 N. E., at 477–478.

[9] See, *e. g.*, *Smith* v. *State*, 773 P. 2d, at 141 ("The general law applicable in situations where jurors see a handcuffed defendant is that, absent a showing of prejudice, their observations do not constitute grounds for a mistrial"); *People* v. *Martin*, 670 P. 2d 22, 25 (Colo. App. 1983) (shackling is not inherently prejudical); *State* v. *Gilbert*, 121 N. H. 305, 310, 429 A. 2d 323, 327 (1981) (shackling is not inherently prejudicial); *State* v. *Moore*, 45 Ore. App. 837, 840, 609 P. 2d 866, 867 (1980) ("[A]bsent a strongly persuasive showing of prejudice to the defendant and that the court abused its discretion, we will not second guess [the trial court's] assessment of its security needs"); *State* v. *Palmigiano*, 112 R. I., at 358, 309 A. 2d, at 861; *State* v. *Polidor*, 130 Vt., at 39, 285 A. 2d, at 773; *State* v. *Norman*, 8 N. C. App. 239, 242, 174 S. E. 2d 41, 44 (1970); *State* v. *Brooks*, 44 Haw., at 84–86, 352 P. 2d, at 613–614; *State* v. *Brewer*, 218 Iowa 1287, 1299, 254 N. W. 834, 840 (1934) ("[T]his court cannot presume that the defendant was prejudiced because he was handcuffed"), overruled by *State* v. *Wilson*, 406 N. W. 2d 442, 449, and n. 1 (Iowa 1987); but see *State* v. *Coursolle*, 255 Minn., at 389, 97 N. W. 2d, at 476–477 (shackling is inherently prejudicial).

be considered in deciding to shackle the defendant and the certainty of the risk that had to be established, with a small minority limiting the use of shackles to instances arising from conduct specific to the particular trial or otherwise requiring an imminent threat.[10] The remaining States permitted courts to consider a range of information outside the trial, including past escape,[11] prior convictions,[12] the nature of the crime for which the defendant was on trial,[13] conduct prior to trial while in prison,[14] any prior disposition toward

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[10] See, *e. g.*, *ibid.* (defining "immediate necessity" as "some reason based on the conduct of the prisoner at the time of the trial"); *Blair* v. *Commonwealth*, 171 Ky., at 327–328, 188 S. W., at 393; *State* v. *Temple*, 194 Mo. 237, 247, 92 S. W. 869, 872 (1906) (citing *State* v. *Kring*, 64 Mo. 591, 592–593 (1877)).

[11] See, *e. g.*, *Commonwealth* v. *Chase*, 350 Mass. 738, 740, 217 N. E. 2d 195, 197 (1966) (attempted escape on two prior occasions, plus the serious nature of the offense for which defendant was being tried supported use of restraints); *People* v. *Thomas*, 1 Mich. App., at 126, 134 N. W. 2d, at 357 (prison escape for which defendant was on trial sufficed to permit use of shackles); *People* v. *Bryant*, 5 Misc. 2d 446, 448, 166 N. Y. S. 2d 59, 61 (1957) (attempts to escape "on prior occasions while in custody," among other things, supported the use of restraints).

[12] See, *e. g.*, *State* v. *Roberts*, 86 N. J. Super. 159, 165, 206 A. 2d 200, 204 (App. Div. 1965) ("In addition to a defendant's conduct *at the time of trial*, . . . defendant's reputation, *his known criminal record*, his character, and the nature of the case must all be weighed" in deciding whether to shackle a defendant (second emphasis added)); *State* v. *Moen*, 94 Idaho, at 480–481, 491 P. 2d, at 861–862 (that three defendants were on trial for escape, had been convicted of burglary two days before their trial for escape, and were being tried together sufficed to uphold trial court's shackling him); *State* v. *McKay*, 63 Nev., at 164, 165 P. 2d, at 409 (prior conviction for burglary and conviction by army court-martial for desertion, among other things, taken into account); *People* v. *Deveny*, 112 Cal. App. 2d 767, 770, 247 P. 2d 128, 130 (1952) (defendant previously convicted of escape from prison); *State* v. *Franklin*, *supra*, at 19, 776 N. E. 2d, at 46–47 (defendant just convicted of three brutal murders).

[13] See, *e. g.*, *State* v. *Roberts*, *supra*, at 165–167, 206 A. 2d, at 204.

[14] See, *e. g.*, *State* v. *Franklin*, *supra*, at 18–20, 776 N. E. 2d, at 46–47 (defendant "had stabbed a fellow inmate with a pen six times in a dispute over turning out a light").

violence,[15] and physical attributes of the defendant, such as his size, physical strength, and age.[16]

The majority permits courts to continue to rely on these factors, which are undeniably probative of the need for shackling, as a basis for shackling a defendant both at trial and at sentencing. *Ante*, at 629. In accepting these traditional factors, the Court rejects what has been adopted by few States—that courts may consider only a defendant's conduct at the trial itself or other information demonstrating that it is a relative certainty that the defendant will engage in disruptive or threatening conduct at his trial. See *State* v. *Coursolle*, 255 Minn. 384, 389, 97 N. W. 2d 472, 477 (1959) (defining "immediate necessity" to be demonstrated only by the defendant's conduct "at the time of the trial"); *State* v. *Finch*, 137 Wash. 2d 792, 850, 975 P. 2d 967, 1001 (1999) (en banc); *Blair* v. *Commonwealth*, 171 Ky. 319, 327–328, 188 S. W. 390, 393 (1916); *State* v. *Temple*, 194 Mo. 237, 247–248, 92 S. W. 869, 872 (1906); but see 136 S. W. 3d, at 485 (case below) (appearing to have abandoned this test).

A number of those traditional factors were present in this case. Here, Deck killed two people to avoid arrest, a fact to which he had confessed. Evidence was presented that Deck had aided prisoners in an escape attempt. Moreover, a jury

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[15] See, *e. g.*, *Frye* v. *Commonwealth*, 231 Va., at 381, 345 S. E. 2d, at 276 (permitting consideration of a "defendant's temperament"); *De Wolf* v. *State*, 95 Okla. Cr. 287, 293–294, 245 P. 2d 107, 114–115 (App. 1952) (permitting consideration of both the defendant's "character" and "disposition toward being a violent and dangerous person, both to the court, the public and to the defendant himself").

[16] See, *e. g.*, *Frye* v. *Commonwealth*, *supra*, at 381–382, 345 S. E. 2d, at 276 ("A trial court may consider various factors in determining whether a defendant should be restrained" including his "physical attributes"); *State* v. *Dennis*, 250 La. 125, 137–138, 194 So. 2d 720, 724 (1967) (no prejudice from "defendant's appearance in prisoner garb, handcuffs and leg-irons before the jury venire" where it was a "'prison inmate case'" and "defendant is a vigorous man of twenty-eight or twenty-nine years of age, about six feet tall, and weighing approximately two hundred and twenty to two hundred and twenty-five pounds").

had found Deck guilty of two murders, the facts of which not only make this crime heinous but also demonstrate a propensity for violence. On this record, and with facts found by a jury, the Court says that it needs more. Since the Court embraces reliance on the traditional factors supporting the use of visible restraints, its only basis for reversing is the requirement of specific on-the-record findings by the trial judge. This requirement is, however, inconsistent with the traditional discretion afforded to trial courts and is unsupported by state practice. This additional requirement of on-the-record findings about that which is obvious from the record makes little sense to me.

4

In recent years, more of a consensus regarding the use of shackling has developed, with many courts concluding that shackling is inherently prejudicial. But rather than being firmly grounded in deeply rooted principles, that consensus stems from a series of ill-considered dicta in *Illinois* v. *Allen*, 397 U. S. 337 (1970), *Estelle* v. *Williams*, 425 U. S. 501 (1976), and *Holbrook* v. *Flynn*, 475 U. S. 560 (1986).

In *Allen*, the trial court had removed the defendant from the courtroom until the court felt he could conform his conduct to basic standards befitting a court proceeding. 397 U. S., at 340–341. This Court held that removing the defendant did not violate his due process right to be present for his trial. In dicta, the Court suggested alternatives to removal, such as citing the defendant for contempt or binding and gagging him. *Id.*, at 344. The Court, however, did express some revulsion at the notion of binding and gagging a defendant. *Ibid.* *Estelle* and *Holbrook* repeated *Allen*'s dicta. *Estelle*, *supra*, at 505; *Holbrook*, *supra*, at 568. The Court in *Holbrook* went one step further than it had in *Allen*, describing shackling as well as binding and gagging in dicta as "inherently prejudicial." 475 U. S., at 568.

The current consensus that the Court describes is one of its own making. *Ante*, at 628. It depends almost exclusively on the dicta in this Court's opinions in *Holbrook*, *Estelle*, and *Allen*. Every lower court opinion the Court cites as evidence of this consensus traces its reasoning back to one or more of these decisions.[17] These lower courts were inter-

[17] *Dyas* v. *Poole*, 309 F. 3d 586, 588–589 (CA9 2002) *(per curiam)* (relying on *Holbrook*), amended and superseded by 317 F. 3d 934 (2003) *(per curiam)*; *Harrell* v. *Israel*, 672 F. 2d 632, 635 (CA7 1982) *(per curiam)* (relying on *Allen* and *Estelle*); *State* v. *Herrick*, 324 Mont. 76, 80–81, 101 P. 3d 755, 758–759 (2004) (relying on *Allen* and *Holbrook*); *Hill* v. *Commonwealth*, 125 S. W. 3d 221, 233 (Ky. 2004) (relying on *Holbrook*); *State* v. *Turner*, 143 Wash. 2d 715, 724–727, 23 P. 3d 499, 504–505 (2001) (en banc) (relying on *State* v. *Finch*, 137 Wash. 2d 792, 842, 975 P. 2d 967, 997–999 (1999) (en banc), which relies on *Allen*, *Estelle*, and *Holbrook*); *Myers* v. *State*, 2000 OK CR 25, ¶¶ 46–47, 17 P. 3d 1021, 1033 (relying on *Owens* v. *State*, 1982 OK CR 1, 187, ¶¶ 4–6, 654 P. 2d 657, 658–659, which relies on *Estelle*); *State* v. *Shoen*, 598 N. W. 2d 370, 375–376 (Minn. 1999) (relying on *Allen*, *Estelle*, and *Holbrook*); *Lovell* v. *State*, 347 Md. 623, 638–639, 702 A. 2d 261, 268–269 (1997) (same); *People* v. *Jackson*, 14 Cal. App. 4th 1818, 1829–1830, 18 Cal. Rptr. 2d 586, 593–594 (1993) (relying on *People* v. *Duran*, 16 Cal. 3d 282, 290–291, 545 P. 2d 1322, 1327 (1976) (in bank), which relies on *Allen*); *Cooks* v. *State*, 844 S. W. 2d 697, 722 (Tex. Crim. App. 1992) (en banc) (relying on *Marquez* v. *State*, 725 S. W. 2d 217, 230 (Tex. Crim. App. 1987) (en banc), overruled on other grounds, *Moody* v. *State*, 827 S. W. 2d 875, 892 (Tex. Crim. App. 1992) (en banc), which relies on *Holbrook*); *State* v. *Tweedy*, 219 Conn. 489, 505, 508, 594 A. 2d 906, 914, 916 (1991) (relying on *Estelle* and *Holbrook*); *State* v. *Crawford*, 99 Idaho 87, 95–96, 577 P. 2d 1135, 1143–1144 (1978) (relying on *Allen* and *Estelle*); *People* v. *Brown*, 45 Ill. App. 3d 24, 26, 358 N. E. 2d 1362, 1363 (1977) (same); *State* v. *Tolley*, 290 N. C. 349, 367, 226 S. E. 2d 353, 367 (1976) (same). See also, *e. g.*, *Anthony* v. *State*, 521 P. 2d, at 496, and n. 33 (relying on *Allen* for the proposition that manacles, shackles, and other physical restraints must be avoided unless necessary to protect some manifest necessity); *State* v. *Brewster*, 164 W. Va., at 180–181, 261 S. E. 2d, at 81–82 (relying on *Allen* and *Estelle* to overrule prior decision permitting reviewing court to presume that the trial court reasonably exercised its discretion even where the trial court had not made findings supporting the use of restraints); *Asch* v. *State*, 62 P. 3d 945, 963–964 (Wyo. 2003) (relying on *Holbrook* and *Estelle* to conclude that shackling is inherently prejudicial, and on *Allen* to conclude that shackling offends the dignity and decorum

preting this Court's dicta, not reaching their own independent consensus about the content of the Due Process Clause. More important, these decisions represent recent practice, which does not determine whether the Fourteenth Amendment, as properly and traditionally interpreted, *i. e.*, as a statement of law, not policy preferences, embodies a right to be free from visible, painless physical restraints at trial.

## III

Wholly apart from the propriety of shackling a defendant at *trial*, due process does not require that a defendant remain free from visible restraints at the penalty phase of a capital trial. Such a requirement has no basis in tradition or even modern state practice. Treating shackling at sentencing as inherently prejudicial ignores the commonsense distinction between a defendant who stands accused and a defendant who stands convicted.

### A

There is no tradition barring the use of shackles or other restraints at sentencing. Even many modern courts have concluded that the rule against visible shackling does not apply to sentencing. See, *e. g.*, *State* v. *Young*, 853 P. 2d 327, 350 (Utah 1993); *Duckett* v. *State*, 104 Nev. 6, 11, 752 P. 2d 752, 755 (1988) *(per curiam)*; *State* v. *Franklin*, 97 Ohio St. 3d 1, 18–19, 776 N. E. 2d 26, 46–47 (2002); but see *Bello* v. *State*, 547 So. 2d 914, 918 (Fla. 1989) (applying rule against shackling at sentencing, but suggesting that "lesser showing of necessity" may be appropriate). These courts have rejected the suggestion that due process imposes such limits because they have understood the difference between a man

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of judicial proceedings); *State* v. *Wilson*, 406 N. W. 2d, at 449, n. 1 (relying in part on *Holbrook* to hold that visible shackling is inherently prejudicial, overruling prior decision that refused to presume prejudice); *State* v. *Madsen*, 57 P. 3d 1134, 1136 (Utah App. 2002) (relying on *Holbrook* for the proposition that shackling is inherently prejudicial).

accused and a man convicted. See, *e. g.*, *Young*, *supra*, at 350; *Duckett*, *supra*, at 11, 752 P. 2d, at 755.

This same understanding is reflected even in the guilt-innocence phase. In instances in which the jury knows that the defendant is an inmate, though not yet convicted of the crime for which he is on trial, courts have frequently held that the defendant's status as inmate ameliorates any prejudice that might have flowed from the jury seeing him in handcuffs.[18] The Court's decision shuns such common sense.

B

In the absence of a consensus with regard to the use of visible physical restraints even in modern practice, we should not forsake common sense in determining what due process requires. Capital sentencing jurors know that the defendant has been convicted of a dangerous crime. It

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[18] See, *e. g.*, *Harlow* v. *State*, 105 P. 3d 1049, 1060 (Wyo. 2005) (where jury knew that the prisoner and two witnesses were all inmates, no prejudice from seeing them in shackles); *Hill* v. *Commonwealth*, *supra*, at 236 ("The trial court's admonition and the fact that the jury already knew Appellant was a convicted criminal and a prisoner in a penitentiary mitigated the prejudice naturally attendant to such restraint"); *State* v. *Woodard*, 121 N. H. 970, 974, 437 A. 2d 273, 275 (1981) (where jury already aware that the defendant was confined, any prejudice was diminished); see also *Payne* v. *Commonwealth*, 233 Va. 460, 466, 357 S. E. 2d 500, 504 (1987) (no error for inmate-witnesses to be handcuffed where jurors were aware that they "were . . . convicted felons and that the crime took place inside a penal institution"); *State* v. *Moss*, 192 Neb. 405, 407, 222 N. W. 2d 111, 113 (1974) (where defendant was an inmate, his appearance at arraignment in leg irons did not prejudice him); *Jessup* v. *State*, 256 Ind. 409, 413, 269 N. E. 2d 374, 376 (1971) ("It would be unrealistic indeed . . . to hold that it was reversible error for jurors to observe the transportation of an inmate of a penal institution through a public hall in a shackled condition"); *People* v. *Chacon*, 69 Cal. 2d 765, 778, 447 P. 2d 106, 115 (1968) (in bank) (where defendant was charged with attacking another inmate, "the use of handcuffs was not unreasonable"); *State* v. *Dennis*, 250 La., at 138, 194 So. 2d, at 724 (no prejudice where defendant of considerable size appeared in prisoner garb, leg irons, and handcuffs before the jury where it was a "'prison inmate case'").

strains credulity to think that they are surprised at the sight of restraints. Here, the jury had already concluded that there was a need to separate Deck from the community at large by convicting him of double murder and robbery. Deck's jury was surely aware that Deck was jailed; jurors know that convicted capital murderers are not left to roam the streets. It blinks reality to think that seeing a convicted capital murderer in shackles in the courtroom could import any prejudice beyond that inevitable knowledge.

Jurors no doubt also understand that it makes sense for a capital defendant to be restrained at sentencing. By sentencing, a defendant's situation is at its most dire. He no longer may prove himself innocent, and he faces either life without liberty or death. Confronted with this reality, a defendant no longer has much to lose—should he attempt escape and fail, it is still lengthy imprisonment or death that awaits him. For any person in these circumstances, the reasons to attempt escape are at their apex. A defendant's best opportunity to do so is in the courtroom, for he is otherwise in jail or restraints. See Westman, Handling the Problem Criminal Defendant in the Courtroom: The Use of Physical Restraints and Expulsion in the Modern Era, 2 San Diego Justice J. 507, 526–527 (1994) (hereinafter Westman).

In addition, having been convicted, a defendant may be angry. He could turn that ire on his own counsel, who has failed in defending his innocence. See, *e. g.*, *State* v. *Forrest*, 168 N. C. App. 614, 626, 609 S. E. 2d 241, 248–249 (2005) (defendant brutally attacked his counsel at sentencing). Or, for that matter, he could turn on a witness testifying at his hearing or the court reporter. See, *e. g.*, *People* v. *Byrnes*, 33 N. Y. 2d 343, 350, 308 N. E. 2d 435, 438 (1974) (defendant lunged at witness during trial); *State* v. *Harkness*, 252 Kan. 510, 516, 847 P. 2d 1191, 1197 (1993) (defendant attacked court reporter at arraignment). Such thoughts could well enter the mind of any defendant in these circumstances, from the most dangerous to the most docile. That a defendant now

convicted of his crimes appears before the jury in shackles thus would be unremarkable to the jury. To presume that such a defendant suffers prejudice by appearing in handcuffs at sentencing does not comport with reality.

IV

The modern rationales proffered by the Court for its newly minted rule likewise fail to warrant the conclusion that due process precludes shackling at sentencing. Moreover, though the Court purports to be mindful of the tragedy that can take place in a courtroom, the stringent rule it adopts leaves no real room for ensuring the safety of the courtroom.

A

Although the Court offers the presumption of innocence as a rationale for the modern rule against shackling at trial, it concedes the presumption has no application at sentencing. *Ante*, at 632. The Court is forced to turn to the far more amorphous need for "accuracy" in sentencing. *Ibid.* It is true that this Court's cases demand reliability in the factfinding that precedes the imposition of a sentence of death. *Monge* v. *California*, 524 U. S. 721, 732 (1998). But shackles may undermine the factfinding process only if seeing a convicted murderer in them is prejudicial. As I have explained, this farfetched conjecture defies the reality of sentencing.

The Court baldly asserts that visible physical restraints could interfere with a defendant's ability to participate in his defense. *Ante*, at 631. I certainly agree that shackles would be impermissible if they were to seriously impair a defendant's ability to assist in his defense, *Riggins* v. *Nevada*, 504 U. S. 127, 154, n. 4 (1992) (THOMAS, J., dissenting), but there is no evidence that shackles do so. Deck does not argue that the shackles caused him pain or impaired his mental faculties. Nor does he argue that the shackles prevented him from communicating with his counsel during trial.

Counsel sat next to him; he remained fully capable of speaking with counsel. Likewise, Deck does not claim that he was unable to write down any information he wished to convey to counsel during the course of the trial. Had the shackles impaired him in that way, Deck could have sought to have at least one of his hands free to make it easier for him to write. Courts have permitted such arrangements. See, *e. g.*, *People* v. *Alvarez*, 14 Cal. 4th 155, 191, 926 P. 2d 365, 386 (1996); *State* v. *Jimerson*, 820 S. W. 2d 500, 502 (Mo. App. 1991).

The Court further expresses concern that physical restraints might keep a defendant from taking the stand on his own behalf in seeking the jury's mercy. *Ante*, at 631. But this concern is, again, entirely hypothetical. Deck makes no claim that, but for the physical restraints, he would have taken the witness stand to plead for his life. And under the rule the Court adopts, Deck and others like him need make no such assertion, for prejudice is presumed absent a showing by the government to the contrary. Even assuming this concern is real rather than imagined, it could be ameliorated by removing the restraints if the defendant wishes to take the stand. See, *e. g.*, *De Wolf* v. *State*, 96 Okla. Cr. 382, 383, 256 P. 2d 191, 193 (App. 1953) (leg irons removed from defendant in capital case when he took the witness stand). Instead, the Court says, the concern requires a categorical rule that the use of visible physical restraints violates the Due Process Clause absent a demanding showing. The Court's solution is overinclusive.

The Court also asserts the rule it adopts is necessary to protect courtroom decorum, which the use of shackles would offend. *Ante*, at 631–632. This courtroom decorum rationale misunderstands this Court's precedent. No decision of this Court has ever intimated, let alone held, that the protection of the "courtroom's formal dignity," *ante*, at 631, is an individual right enforceable by criminal defendants. Certainly, courts have always had the inherent power to ensure that both those who appear before them and those who ob-

serve their proceedings conduct themselves appropriately. See, *e. g.*, *Estes* v. *Texas*, 381 U. S. 532, 540–541 (1965).

The power of the courts to maintain order, however, is not a right personal to the defendant, much less one of constitutional proportions. Far from viewing the need for decorum as a right the defendant can invoke, this Court has relied on it to *limit* the conduct of defendants, even when their constitutional rights are implicated. This is why a defendant who proves himself incapable of abiding by the most basic rules of the court is not entitled to defend himself, *Faretta* v. *California*, 422 U. S., at 834–835, n. 46, or to remain in the courtroom, see *Allen*, 397 U. S., at 343. The concern for courtroom decorum is not a concern about defendants, let alone their right to due process. It is a concern about society's need for courts to operate effectively.

Wholly apart from the unwarranted status the Court accords "courtroom decorum," the Court fails to explain the affront to the dignity of the courts that the sight of physical restraints poses. I cannot understand the indignity in having a convicted double murderer and robber appear before the court in visible physical restraints. Our Nation's judges and juries are exposed to accounts of heinous acts daily, like the brutal murders Deck committed in this case. Even outside the courtroom, prisoners walk through courthouse halls wearing visible restraints. Courthouses are thus places in which members of the judiciary and the public come into frequent contact with defendants in restraints. Yet, the Court says, the appearance of a convicted criminal in a belly chain and handcuffs at a sentencing hearing offends the sensibilities of our courts. The courts of this Nation do not have such delicate constitutions.

Finally, the Court claims that "[t]he appearance of the offender during the penalty phase in shackles . . . almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community—often a statutory aggravator and nearly always a

relevant factor in jury decisionmaking." *Ante*, at 633. This argument is flawed. It ignores the fact that only relatively recently have the penalty and guilt phases been conducted separately. That the historical evidence reveals no consensus prohibiting visible modern-day shackles during capital trials suggests that there is similarly no consensus prohibiting shackling during capital sentencing. Moreover, concerns about a defendant's dangerousness exist at the guilt phase just as they exist at the penalty phase—jurors will surely be more likely to convict a seemingly violent defendant of murder than a seemingly placid one. If neither common law nor modern state cases support the Court's position with respect to the guilt phase, I see no reason why the fact that a defendant may be perceived as a future danger would support the Court's position with respect to the penalty phase.

B

The Court expresses concern for courtroom security, but its concern rings hollow in light of the rule it adopts. The need for security is real. Judges face the possibility that a defendant or his confederates might smuggle a weapon into court and harm those present, or attack with his bare hands. For example, in 1999, in Berks County, Pennsylvania, a "defendant forced his way to the bench and beat the judge unconscious." Calhoun, Violence Toward Judicial Officials, 576 Annals of the American Academy of Political and Social Science 54, 61 (2001). One study of Pennsylvania judges projected that over a 20-year career, district justices had a 31 percent probability of being physically assaulted one or more times. See Harris, Kirschner, Rozek, & Weiner, Violence in the Judicial Workplace: One State's Experience, 576 Annals of the American Academy of Political and Social Science 38, 42 (2001). Judges are not the only ones who face the risk of violence. Sheriffs and courtroom bailiffs face the second highest rate of homicide in the workplace, a rate which is 15 times higher than the national average. Faust & Raffo,

Local Trial Court Response to Courthouse Safety, 576 Annals of the American Academy of Political and Social Science 91, 93–94 (2001); Weiner et al., Safe and Secure: Protecting Judicial Officials, 36 Court Review 26, 27 (Winter 2000).

The problem of security may only be worsening. According to the General Accounting Office (GAO), the nature of the prisoners in the federal system has changed: "[T]here are more 'hard-core tough guys' and more multiple-defendant cases," making the work of the federal marshals increasingly difficult. GAO, Federal Judicial Security: Comprehensive Risk-Based Program Should Be Fully Implemented 21 (July 1994). Security issues are particularly acute in state systems, in which limited manpower and resources often leave judges to act as their own security. See Harris, *supra*, at 46. Those resources further vary between rural and urban areas, with many rural areas able to supply only minimal security. Security may even be at its weakest in the courtroom itself, for there the defendant is the least restrained. Westman 526.

In the face of this real danger to courtroom officials and bystanders, the Court limits the use of visible physical restraints to circumstances "specific to a particular trial," *ante*, at 629, *i. e.*, "particular concerns . . . related to the defendant on trial," *ante*, at 633. Confining the analysis to trial-specific circumstances precludes consideration of limits on the security resources of courts. Under that test, the particulars of a given courthouse (being nonspecific to any particular defendant) are irrelevant, even if the judge himself is the only security, or if a courthouse has few on-duty officers standing guard at any given time, or multiple exits. Forbidding courts from considering such circumstances fails to accommodate the unfortunately dire security situation faced by this Nation's courts.

* * *

The Court's decision risks the lives of courtroom personnel, with little corresponding benefit to defendants. This is a risk that due process does not require. I respectfully dissent.

Syllabus

# MEDELLIN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 04–5928. Argued March 28, 2005—Decided May 23, 2005

Petitioner Mexican national sought federal habeas review of his state capital murder conviction, claiming that Texas had not notified him of his right to consular access as required by the Vienna Convention. The District Court denied relief. In declining to grant petitioner a certificate of appealability, the Fifth Circuit gave no effect to an intervening International Court of Justice (ICJ) ruling that United States courts must reconsider petitioner's Vienna Convention claim. After this Court granted certiorari, President George W. Bush issued a memorandum stating that the United States would discharge its international obligations under the ICJ judgment by "having State courts give effect to" it. Relying on this memorandum and the ICJ judgment, petitioner filed a state habeas application shortly before oral argument here.

*Held:* The writ of certiorari is dismissed as improvidently granted. The state proceeding may give petitioner the review and reconsideration of his Vienna Convention claim that he now seeks in this proceeding. In addition, merits briefing in this case has revealed several threshold issues that could independently preclude federal habeas relief.

Certiorari dismissed. Reported below: 371 F. 3d 270.

*Donald Francis Donovan* argued the cause for petitioner. With him on the briefs were *Carl Micarelli*, *Catherine M. Amirfar*, *Thomas J. Bollyky*, and *Gary Taylor*.

*R. Ted Cruz*, Solicitor General of Texas, argued the cause for respondent. With him on the brief were *Greg Abbott*, Attorney General, *Barry R. McBee*, First Assistant Attorney General, *Don Clemmer*, Deputy Attorney General, and *Sean D. Jordan*, *Kristofer S. Monson*, and *Adam W. Aston*, Assistant Solicitors General.

*Deputy Solicitor General Dreeben* argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Clem-*

*ent, Assistant Attorney General Wray, Irving L. Gornstein,* and *Robert J. Erickson.**

PER CURIAM.

We granted certiorari in this case to consider two questions: first, whether a federal court is bound by the International Court of Justice's (ICJ) ruling that United States

*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Robert J. Grey, Jr.*, and *Jeffrey L. Bleich;* for Bar Associations et al. by *Kevin R. Sullivan, William J. Aceves,* and *Clifford S. Anderson;* for Foreign Sovereigns by *Asim M. Bhansali* and *Steven A. Hirsch;* for Former United States Diplomats by *Harold Hongju Koh, Donald B. Ayer,* and *William K. Shirey II;* for the Government of the United Mexican States by *Sandra L. Babcock;* for NAFSA: Association of International Educators et al. by *Stephen F. Hanlon;* and for Ambassador L. Bruce Laingen et al. by *Joseph Margulies.*

Briefs of *amici curiae* urging affirmance were filed for the State of Alabama et al. by *Troy King,* Attorney General of Alabama, and *J. Clayton Crenshaw* and *Charles B. Campbell,* Assistant Attorneys General, and by the Attorneys General for their respective States as follows: *Terry Goddard* of Arizona, *Bill Lockyer* of California, *John W. Suthers* of Colorado, *M. Jane Brady* of Delaware, *Charles J. Crist, Jr.,* of Florida, *Thurbert E. Baker* of Georgia, *Lawrence G. Wasden* of Idaho, *Steve Carter* of Indiana, *Phill Kline* of Kansas, *Jim Hood* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Thomas W. Corbett* of Pennsylvania, *Henry D. McMaster* of South Carolina, *Paul G. Summers* of Tennessee, *Mark L. Shurtleff* of Utah, and *Judith Williams Jagdmann* of Virginia; for the Alliance Defense Fund by *Nelson P. Miller, William Wagner,* and *Benjamin Bull;* for the Criminal Justice Legal Foundation by *Kent S. Scheidegger;* for the Liberty Legal Institute by *Kelly Shackelford;* for the National District Attorneys' Association by *Charles C. Olson* and *Thomas J. Charron;* for Professors of International Law et al. by *Paul B. Stephan;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp.*

Briefs of *amici curiae* were filed for the European Union et al. by *S. Adele Shank* and *John B. Quigley;* for International Law Experts et al. by *Lori Fisler Damrosch* and *Charles Owen Verrill, Jr.;* for the Mountain States Legal Foundation by *William Perry Pendley;* and for Senator John Cornyn by *Charles J. Cooper, Vincent J. Colatriano,* and *David H. Thompson.*

courts must reconsider petitioner José Medellín's claim for relief under the Vienna Convention on Consular Relations, Apr. 24, 1963, [1970] 21 U. S. T. 77, 100–101, T. I. A. S. No. 6820, without regard to procedural default doctrines; and second, whether a federal court should give effect, as a matter of judicial comity and uniform treaty interpretation, to the ICJ's judgment. 543 U. S. 1032 (2004). After we granted certiorari, Medellín filed an application for a writ of habeas corpus in the Texas Court of Criminal Appeals, relying in part upon a memorandum from President George W. Bush that was issued after we granted certiorari. This state-court proceeding may provide Medellín with the very reconsideration of his Vienna Convention claim that he now seeks in the present proceeding. The merits briefing in this case also has revealed a number of hurdles Medellín must surmount before qualifying for federal habeas relief in this proceeding, based on the resolution of the questions he has presented here. For these reasons we dismiss the writ as improvidently granted. See *Ticor Title Ins. Co.* v. *Brown*, 511 U. S. 117, 121–122 (1994) *(per curiam); The Monrosa* v. *Carbon Black Export, Inc.*, 359 U. S. 180, 183–184 (1959); *Goins* v. *United States*, 306 U. S. 622 (1939).

Medellín, a Mexican national, confessed to participating in the gang rape and murder of two girls in 1993. He was convicted and sentenced to death, and the Texas Court of Criminal Appeals affirmed on direct appeal. Medellín then filed a state habeas corpus action, claiming for the first time that Texas failed to notify him of his right to consular access as required by the Vienna Convention. The state trial court rejected this claim, and the Texas Court of Criminal Appeals summarily affirmed.

Medellín then filed this federal habeas corpus petition, again raising the Vienna Convention claim. The District Court denied the petition. Subsequently, while Medellín's application to the Court of Appeals for the Fifth Circuit for a certificate of appealability was pending, see 28 U. S. C.

§2253(c), the ICJ issued its decision in *Case Concerning Avena and other Mexican Nationals (Mex.* v. *U. S.)*, 2004 I. C. J. No. 128 (Judgment of Mar. 31), in which the Republic of Mexico had alleged violations of the Vienna Convention with respect to Medellín and other Mexican nationals facing the death penalty in the United States. The ICJ determined that the Vienna Convention guaranteed individually enforceable rights, that the United States had violated those rights, and that the United States must "provide, by means of its own choosing, review and reconsideration of the convictions and sentences of the [affected] Mexican nationals" to determine whether the violations "caused actual prejudice," without allowing procedural default rules to bar such review. *Id.*, ¶¶ 121–122, 153(a).

The Court of Appeals denied Medellín's application for a certificate of appealability. It did so based on Medellín's procedural default, see *Breard* v. *Greene*, 523 U. S. 371, 375 (1998) *(per curiam)*, and its prior holdings that the Vienna Convention did not create an individually enforceable right, see, *e. g.*, *United States* v. *Jimenez-Nava*, 243 F. 3d 192, 195 (CA5 2001). 371 F. 3d 270 (CA5 2004). While acknowledging the existence of the ICJ's *Avena* judgment, the court gave no dispositive effect to that judgment.

More than two months after we granted certiorari, and a month before oral argument in this case, President Bush issued a memorandum that stated the United States would discharge its international obligations under the *Avena* judgment by "having State courts give effect to the [ICJ] decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision." George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005), App. 2 to Brief for United States as *Amicus Curiae* 9a. Relying on this memorandum and the *Avena* judgment as separate bases for relief that were not available at the time of his first state habeas corpus action, Medellín filed a successive state application for a writ of habeas corpus

just four days before oral argument here. That state proceeding may provide Medellín with the review and reconsideration of his Vienna Convention claim that the ICJ required, and that Medellín now seeks in this proceeding. This new development, as well as the factors discussed below, leads us to dismiss the writ of certiorari as improvidently granted.[1]

There are several threshold issues that could independently preclude federal habeas relief for Medellín, and thus render advisory or academic our consideration of the questions presented. These issues are not free from doubt.

First, even accepting, *arguendo*, the ICJ's construction of the Vienna Convention's consular access provisions, a violation of those provisions may not be cognizable in a federal habeas proceeding. In *Reed* v. *Farley*, 512 U. S. 339 (1994), this Court recognized that a violation of federal statutory rights ranked among the "nonconstitutional lapses we have held not cognizable in a postconviction proceeding" unless they meet the "fundamental defect" test announced in our decision in *Hill* v. *United States*, 368 U. S. 424, 428 (1962). 512 U. S., at 349 (plurality opinion); see also *id.*, at 355–356 (SCALIA, J., concurring in part and concurring in judgment). In order for Medellín to obtain federal habeas relief, Medellín must therefore establish that *Reed* does not bar his treaty claim.

Second, with respect to any claim the state court "adjudicated on the merits," habeas relief in federal court is available only if such adjudication "was contrary to, or an unreasonable application of, clearly established Federal law, as

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[1] Of course Medellín, or the State of Texas, can seek certiorari in this Court from the Texas courts' disposition of the state habeas corpus application. In that instance, this Court would in all likelihood have an opportunity to review the Texas courts' treatment of the President's memorandum and *Case Concerning Avena and other Mexican Nationals (Mex. v. U. S.)*, 2004 I. C. J. No. 128 (Judgment of Mar. 31), unencumbered by the issues that arise from the procedural posture of this action.

determined by the Supreme Court." 28 U. S. C. § 2254(d)(1); see *Woodford* v. *Visciotti*, 537 U. S. 19, 22–27 (2002) *(per curiam)*. The state habeas court, which disposed of the case before the ICJ rendered its judgment in *Avena*, arguably "adjudicated on the merits" three claims. It found that the Vienna Convention did not create individual, judicially enforceable rights and that state procedural default rules barred Medellín's consular access claim. Finally, and perhaps most importantly, the state trial court found that Medellín "fail[ed] to show that he was harmed by any lack of notification to the Mexican consulate concerning his arrest for capital murder; [Medellín] was provided with effective legal representation upon [his] request; and [his] constitutional rights were safeguarded." App. to Pet. for Cert. 56a.[2] Medellín would have to overcome the deferential standard with regard to all of these findings before obtaining federal habeas relief on his Vienna Convention claim.[3]

Third, a habeas corpus petitioner generally cannot enforce a "new rule" of law. *Teague* v. *Lane*, 489 U. S. 288 (1989).

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[2] The Federal District Court reviewing that finding observed:

"Medellín's allegations of prejudice are speculative. The police officers informed Medellín of his right to legal representation before he confessed to involvement in the murders. Medellín waived his right to advisement by an attorney. Medellín does not challenge the voluntary nature of his confession. There is no indication that, if informed of his consular rights, Medellín would not have waived those rights as he did his right to counsel. Medellín fails to establish a 'causal connection between the [Vienna Convention] violation and [his] statements.'" App. to Pet. for Cert. 84a–85a (brackets in original).

[3] In *Breard* v. *Greene*, 523 U. S. 371 (1998) *(per curiam)*, we addressed the claim that Virginia failed to notify a Paraguayan national of his Vienna Convention right to consular access. In denying various writs, motions, and stay applications, we noted that the Vienna Convention "arguably confers on an individual the right to consular assistance following arrest"; that Virginia's procedural default doctrine applied to the Vienna Convention claim; and that a successful Vienna Convention claimant likely must demonstrate prejudice. *Id.*, at 375–377. At the time of our *Breard* decision, however, we confronted no final ICJ adjudication.

Before relief could be granted, then, we would be obliged to decide whether or how the *Avena* judgment bears on our ordinary "new rule" jurisprudence.

Fourth, Medellín requires a certificate of appealability in order to pursue the merits of his claim on appeal. 28 U. S. C. § 2253(c)(1). A certificate of appealability may be granted only where there is "a substantial showing of the denial of a *constitutional* right." § 2253(c)(2) (emphasis added). To obtain the necessary certificate of appealability to proceed in the Court of Appeals, Medellín must demonstrate that his allegation of a *treaty* violation could satisfy this standard. See *Slack* v. *McDaniel*, 529 U. S. 473, 483 (2000).

Fifth, Medellín can seek federal habeas relief only on claims that have been exhausted in state court. See 28 U. S. C. §§ 2254(b)(1)(A), (b)(3). To gain relief based on the President's memorandum or ICJ judgments, Medellín would have to show that he exhausted all available state-court remedies.[4]

In light of the possibility that the Texas courts will provide Medellín with the review he seeks pursuant to the *Avena* judgment and the President's memorandum, and the potential for review in this Court once the Texas courts have heard and decided Medellín's pending action, we think it would be unwise to reach and resolve the multiple hin-

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[4] On March 8, 2005, Medellín filed a successive state habeas action based on Tex. Code Crim. Proc. Ann., Art. 11.071, § 5(a)(1) (Vernon 2005), claiming that both the President's memorandum and the *Avena* judgment independently require the Texas court to grant review and reconsideration of his Vienna Convention claim. See Subsequent Application for Post-Conviction Writ of Habeas Corpus in *Ex Parte Medellín*, Trial Cause Nos. 67,5429 and 67,5430 (Tex. Crim. App.), p. 6 (filed Mar. 24, 2005) ("*First*, the President's determination requires this Court to comply with the *Avena* Judgment and remand Mr. Medellín's case for the mandated review and reconsideration of his Vienna Convention claim. *Second*, the *Avena* Judgment on its own terms provides the rule of decision in Mr. Medellín's case and should be given direct effect by this Court").

drances to dispositive answers to the questions here presented. Accordingly, we dismiss the writ as improvidently granted.

*It is so ordered.*

JUSTICE GINSBURG, with whom JUSTICE SCALIA joins as to Part II, concurring.

Petitioner José Medellín, a Mexican national, was arrested, detained, tried, convicted, and sentenced to death in Texas without being informed of rights accorded him under the Vienna Convention on Consular Relations, Apr. 24, 1963, [1970] 21 U. S. T. 77, 100–101, T. I. A. S. No. 6820. The Convention called for prompt notice of Medellín's arrest to the Mexican consul. Medellín could then seek consular advice and assistance.

After unsuccessful challenges to his conviction and sentence, first in state court, later in federal court, Medellín sought this Court's review. His petition for certiorari, which this Court granted, rests primarily on a judgment rendered by the International Court of Justice (ICJ) on March 31, 2004: *Case Concerning Avena and other Mexican Nationals (Mex.* v. *U. S.)*, 2004 I. C. J. No. 128 *(Avena)*. Medellín's petition also draws support from an ICJ judgment of the same order earlier rendered against the United States: *LaGrand Case (F. R. G.* v. *U. S.)*, 2001 I. C. J. 466 (Judgment of June 27) *(LaGrand)*. The ICJ held in *Avena* that the failure to accord Vienna Convention rights to Medellín and other similarly situated Mexican nationals necessitated review and reconsideration of their convictions and sentences by United States courts. Further, the ICJ specified, procedural default doctrines could not be invoked to bar the required review and reconsideration. Medellín sought certiorari on two questions: (1) Are courts in the United States bound by the *Avena* judgment; (2) Should courts in the United States give effect to the *Avena* and *LaGrand* judg-

ments "in the interest of judicial comity and uniform treaty interpretation." Brief for Petitioner i.

On February 28, 2005, President Bush announced:

> "[T]he United States will discharge its international obligations under the decision of the International Court of Justice in *[Avena]*, by having State courts give effect to the decision in accordance with general principles of comity." Memorandum for the Attorney General (Feb. 28, 2005), App. 2 to Brief for United States as *Amicus Curiae* 9a (hereinafter President's Memorandum).

Medellín thereupon moved to stay further proceedings in this Court pending his pursuit of remedies in Texas court, as contemplated by the President's Memorandum. I would grant Medellín's stay motion as the most conservative among courses the Court might take. That "least change" measure, however, has not garnered majority support.

## I

The Court is divided between two responses to Medellín's petition in light of the President's Memorandum: (1) remand to the Court of Appeals for the Fifth Circuit for initial rulings on a host of difficult issues, *post*, at 684, 690 (O'CONNOR, J., dissenting), recognizing that court's prerogative to hold the case in abeyance pending Medellín's pursuit of relief in state court, *post*, at 690; or (2) dismiss the writ, recognizing that "in all likelihood" this Court would be positioned "to review the Texas courts' treatment of the President's [M]emorandum and [the *Avena* judgment] unencumbered by the [threshold] issues that arise from the procedural posture of this action," *ante*, at 664, n. 1. The former course would invite the Fifth Circuit to conduct proceedings rival to those recently launched in state court, or to put the case on hold, a cautionary measure this Court itself is unwilling to take. The latter would leave nothing pending here, but would enable this Court ultimately to resolve, clearly and cleanly, the

controlling effect of the ICJ's *Avena* judgment, shorn of procedural hindrances that pervade the instant action.

II

For the reasons stated below, I join the Court's election to dismiss the writ as improvidently granted in light of the President's Memorandum and the state-court proceeding instituted in accordance with that Memorandum. I do so recognizing that this Court would have jurisdiction to review the final judgment in the Texas proceedings, and at that time, to rule definitively on "the Nation's obligation under the judgment of the ICJ if that should prove necessary." *Post*, at 691 (SOUTER, J., dissenting).

The principal dissent would return the case to the Fifth Circuit leaving unresolved a bewildering array of questions. See *post*, at 684 (opinion of O'CONNOR, J.) (describing issues not touched by this Court as "difficult"). Among inquiries left open "for further proceedings": Is a certificate of appealability (COA) available when the applicant is not complaining of "the denial of a constitutional right"? *Post*, at 677 (O'CONNOR, J., dissenting) (internal quotation marks omitted); see also *post*, at 677–679; cf. *ante*, at 666. What directions must a lower court take from *Teague* v. *Lane*, 489 U. S. 288 (1989), and perhaps from *Reed* v. *Farley*, 512 U. S. 339 (1994), and *Hill* v. *United States*, 368 U. S. 424 (1962)? *Post*, at 681–682 (O'CONNOR, J., dissenting); cf. *ante*, at 664–666. Is it open to a lower court to resolve the "conflict between *Avena* and [this Court's] decision in *Breard* v. *Greene*, 523 U. S. 371, 376 (1998) *(per curiam)*"? *Post*, at 684 (O'CONNOR, J., dissenting).[1] Has Medellín exhausted state avenues for relief, see *ante*, at 666; *Rhines* v. *Weber*, *ante*, p. 269; *Rose* v. *Lundy*, 455 U. S. 509, 518–520 (1982); cf. *post*, at 682–683, n. 1 (O'CONNOR, J., dissenting), given that the *Avena*

[1] See *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U. S. 477, 484 (1989) (cautioning lower courts against disturbing this Court's decisions). But cf. *post*, at 691–692 (SOUTER, J., dissenting).

judgment and the President's response to it postdate the rejection of Medellín's pleas in Texas proceedings? While contentious preliminary issues clog final determination of Medellín's claim for federal habeas relief based on the ICJ's judgments, action by the Texas courts could render the entire array of questions moot. See *post*, at 692 (SOUTER, J., dissenting) ("[A]ction in the Texas courts might remove any occasion to proceed under the federal habeas petition.").

Further, at odds with the President's determination to "give effect to the *[Avena]* decision in accordance with general principles of comity," President's Memorandum, and in conspicuous conflict with the law of judgments, see Restatement (Second) of Conflict of Laws § 98 (1988); Restatement (Third) of Foreign Relations Law of the United States § 481 (1986); Restatement (Second) of Judgments § 17 (1980), the principal dissent would instruct the Court of Appeals to "hol[d] up the *Avena* interpretation of the [Vienna Convention] against the domestic court's own conclusions." *Post*, at 684 (opinion of O'CONNOR, J.). But cf. ALI, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute § 2, Comment *d*, p. 38 (2005) ("[A] judgment entitled to recognition will not be reexamined on the merits by a second court."). It is the long-recognized general rule that, when a judgment binds or is respected as a matter of comity, a "let's see if we agree" approach is out of order. See *Hilton* v. *Guyot*, 159 U. S. 113, 202–203 (1895) (where "comity of this nation" calls for recognition of a judgment rendered abroad, "the merits of the case should not . . . be tried afresh . . . upon the mere assertion . . . that the judgment was erroneous in law or in fact"); see also Restatement (Second) of Conflict of Laws § 106 (1969) ("A judgment will be recognized and enforced in other states even though an error of fact or of law was made in the proceedings before judgment . . . ."); *id.*, § 106, Comment *a* ("Th[is] rule is . . . applicable to judgments rendered in foreign nations . . . ."); Reese, The Status in This Country of Judgments Rendered

Abroad, 50 Colum. L. Rev. 783, 789 (1950) ("[Foreign] judgments will not be denied effect merely because the original court made an error either of fact or of law.").[2]

Troubling as well, the principal dissent provides no clear instructions to the Court of Appeals on which of the several questions the dissenters would remit to that court comes first, which others "should be part of" the COA determination, *post*, at 682 (opinion of O'CONNOR, J.), and which are meet for adjudication only if, as, or when a COA is granted. The participation of a federal court in the fray at this point, moreover, risks disturbance of, or collision with, the proceeding Medellín has commenced in Texas. The principal dissent appears ultimately to acknowledge that concern by observing that the Fifth Circuit might "hold the case on its docket until Medellín's successive petition was resolved in state court." *Post*, at 690 (opinion of O'CONNOR, J.); see also

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[2] The principal dissent maintains that the second question on which we granted certiorari asks "whether and what weight [short of binding effect] American courts should give to *Avena*," in the course of independently interpreting the treaty, "perhaps for sake of uniform treaty interpretation." *Post*, at 684 (opinion of O'CONNOR, J.); see *post*, at 684–685, and n. 2 (same). Significantly, Medellín chose not to break out for discrete review in this Court questions underlying and subsumed in the ICJ's judgments in *Avena*, 2004 I. C. J. No. 128 (Judgment of Mar. 31), and *LaGrand*, 2001 I. C. J. 466 (Judgment of June 27), *i. e.*, whether the Vienna Convention "creates a judicially enforceable individual right" and whether it "sometimes requires state procedural default rules to be set aside so that the treaty can be given 'full effect,'" *post*, at 673 (O'CONNOR, J., dissenting). Nor does Medellín's invocation of "international comity," Brief for Petitioner 45, or his plea for "uniform treaty interpretation," *id.*, at 48, seek this Court's independent interpretation of the Convention. Instead, he urges that comity is accorded, and uniformity achieved, by recognizing as authoritative the ICJ's interpretation as elaborated in successive judgments against the United States. See *id.*, at 49 ("Given its consent to the ICJ's jurisdiction, the United States should treat as authoritative *any* interpretation or application of the Convention by that court."); see also Reply Brief 16 (observing that the United States "agreed that the ICJ would have *final* authority to resolve disputes over the treaty's interpretation and application" (emphasis added)).

*post*, at 692 (SOUTER, J., dissenting); *post*, at 694 (BREYER, J., dissenting). But given this Court's unwillingness to put the case on hold here, one might ask what justifies parking the case, instead, in the Court of Appeals.

The *per curiam* opinion which I join rests on two complementary grounds. First, the Texas proceeding "may provide Medellín with the very reconsideration of his Vienna Convention claim that he now seeks in the present proceeding." *Ante*, at 662. Second, the instant proceeding comes to us freighted with formidable threshold issues, *ante*, at 664–666, that deter definitive answers to the questions presented in the petition for certiorari.

Petitioner's recent filing in the Texas Court of Criminal Appeals raises two discrete bases for relief that were not previously available for presentation to a state forum: the ICJ's *Avena* judgment and the President's Memorandum. See Subsequent Application for Post-Conviction Writ of Habeas Corpus in *Ex Parte Medellín*, Trial Cause Nos. 67,5429 and 67,5430 (Tex. Crim. App.), p. 13 (filed Mar. 24, 2005) ("President Bush's determination and the *Avena* Judgment constitute two separate sources of binding federal law."). The Texas courts are now positioned immediately to adjudicate these cleanly presented issues in the first instance. In turn, it will be this Court's responsibility, at the proper time and if need be, to provide the ultimate answers.

JUSTICE O'CONNOR, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER join, dissenting.

José Ernesto Medellín offered proof to the Court of Appeals that reasonable jurists would find debatable or wrong the District Court's disposition of his claim that Texas violated his rights under the Vienna Convention on Consular Relations and that he is thereby entitled to review and reconsideration of his conviction and sentence. Three specific issues deserve further consideration: (1) whether the International Court of Justice's judgment in Medellín's favor, *Case*

*Concerning Avena and Other Mexican Nationals (Mex.* v. *U. S.)*, 2004 I. C. J. No. 128 (Judgment of Mar. 31), is binding on American courts; (2) whether Article 36(1)(b) of the Convention creates a judicially enforceable individual right; and (3) whether Article 36(2) of the Convention sometimes requires state procedural default rules to be set aside so that the treaty can be given "full effect." Accordingly, I would vacate the denial of a certificate of appealability and remand for resolution of these issues.

The Court dismisses the writ (and terminates federal proceedings) on the basis of speculation: Medellín *might* obtain relief in new state court proceedings—because of the President's recent memorandum about whose constitutionality the Court remains rightfully agnostic, or he *might* be unable to secure ultimate relief in federal court—because of questions about whose resolution the Court is likewise, rightfully, undecided. These tentative predictions are not, in my view, reason enough to avoid questions that are as compelling now as they were when we granted a writ of certiorari, and that remain properly before this Court. It seems to me unsound to avoid questions of national importance when they are bound to recur. I respectfully dissent.

## I

Article 36 of the Vienna Convention on Consular Relations guarantees open channels of communication between detained foreign nationals and their consulates in signatory countries:

> "[I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authori-

> ties without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph." Vienna Convention on Consular Relations, Art. 36(1)(b), Apr. 24, 1963, [1970] 21 U. S. T. 77, 101, T. I. A. S. No. 6820.

Presently 167 nations are party to the Vienna Convention, including our immediate neighbors to the north and south. Multilateral Treaties Deposited with the Secretary-General United Nations, N. Y., http://untreaty.un.org/English/bible/englishinternetbible/partI/chapterIII/treaty31.asp (all Internet materials as visited May 19, 2005, and available in Clerk of Court's case file).

In this country, the individual States' (often confessed) noncompliance with the treaty has been a vexing problem. See, *e. g.*, *United States* v. *Emuegbunam*, 268 F. 3d 377, 391 (CA6 2001) (discussing cases about Vienna Convention violations). It has three times been the subject of proceedings in the International Court of Justice (ICJ). See *Case Concerning Vienna Convention on Consular Relations (Para.* v. *U. S.)*, 1998 I. C. J. 426 (Order of Nov. 10); *LaGrand Case (F. R. G.* v. *U. S.)*, 2001 I. C. J. 466 (Judgment of June 27); *Avena, supra.* The problem may have considerable ramifications, because foreign nationals are regularly subject to state criminal justice systems. For example, in 2003, over 56,000 noncitizens were held in state prisons. Noncitizens accounted for over 10% of the prison populations in California, New York, and Arizona. U. S. Dept. of Justice, Bureau of Justice Statistics Bull., p. 5 (rev. July 14, 2004), Prison and Jail Inmates at Midyear 2003, http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim03.pdf.

Noncompliance with our treaty obligations is especially worrisome in capital cases. As of February 2005, 119 noncitizens from 31 nations were on state death row. Foreign Nationals and the Death Penalty in the United States, Reported Foreign Nationals Under Sentence of Death in the U. S., http://www.deathpenaltyinfo.org/article.php?did=198&

scid=31. In *Avena*, the ICJ determined that the United States had breached its obligation to inform 51 Mexican nationals, all sentenced to death in this country, of their right to consular notification. Medellín is just one of them. 2004 I. C. J. No. 128, ¶ 106. His case thus presents, and the Court in turn avoids, questions that will inevitably recur.

José Ernesto Medellín told the officers who arrested him in Texas that he was born in Laredo, Mexico. App. JA15. He also told the Harris County Pretrial Services that he is not an American citizen. App. to Pet. for Cert. 165a. Nonetheless, Medellín was arrested, detained, tried, convicted, and sentenced to death without ever being informed that he could contact the Mexican consul. Mexican consular authorities only became aware of Medellín's predicament some six weeks after his conviction was affirmed, when he wrote them a letter from Texas' death row. Since coming into contact with his consul, Medellín has maintained that Texas authorities violated his rights under the Convention and has sought (among other relief) an evidentiary hearing to determine whether he was prejudiced by the violation.

First, Medellín filed a state application for a writ of habeas corpus. The Texas trial court denied relief, reasoning in relevant part:

> "13. Based on the applicant's lack of objection at trial to the alleged failure to inform him of his rights under the Vienna Convention, the applicant is procedurally barred from presenting his habeas claim that the alleged violation of the Vienna Convention violated his constitutional rights. *Hodge* v. *State*, 631 S. W. 2d 754, 757 (Tex. Crim. App. 1982); *Williams* v. *State*, 549 S. W. 2d 183, 187 (Tex. Crim. App. 1977).
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> "15. In the alternative, the applicant, as a private individual, lacks standing to enforce the provisions of the Vienna Convention. *Hinojosa* v. *State*, No. 72,932 (Tex. Crim. App. Oct. 27, 1999) (holding that treaties operate

> as contracts among nations; thus, offended nation, not individual, must seek redress for violation of sovereign interests)." *Id.*, at 55a–56a.

The Texas Court of Criminal Appeals affirmed.

Medellín next petitioned for habeas relief in the United States District Court for the Southern District of Texas. While that petition was pending, the ICJ announced its interpretation of Article 36 in a case that Germany had brought against the United States after Arizona failed to advise two German capital defendants about consular notification. *LaGrand, supra.* Consistent with Medellín's own arguments about the Convention's meaning, the ICJ decided in *LaGrand* that the treaty confers individual rights and requires that state procedural default rules sometimes give way when foreign national defendants raise Vienna Convention claims. See *id.*, at 490–491, 497–498. Medellín argued to the District Court that the ICJ's interpretation of Article 36 was definitive, persuasive, and should control the resolution of his claim. Rejecting these and other arguments, the District Court denied relief.

Medellín then sought to obtain a certificate of appealability (COA) from the United States Court of Appeals for the Fifth Circuit. See 28 U. S. C. § 2253(c). A COA may issue only if the applicant has demonstrated that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner [in the district court] or that the issues presented were '"adequate to deserve encouragement to proceed further."'" *Slack* v. *McDaniel*, 529 U. S. 473, 484 (2000) (quoting *Barefoot* v. *Estelle*, 463 U. S. 880, 893, n. 4 (1983)).

Meanwhile, Mexico had initiated proceedings in the ICJ against the United States on grounds that 54 Mexican capital defendants, including Medellín, had been denied their Vienna Convention rights. See *Avena, supra.* The ICJ's decision in *Avena* issued while Medellín's application for a COA was pending. Repeating the construction it had given to Article

36 in *LaGrand*, the ICJ decided that Medellín and 50 others were entitled to review and reconsideration of their convictions and sentences because the United States, through various individual States, had violated their Vienna Convention rights. *Avena*, *supra*, ¶ 153. The Court of Appeals noted the ICJ's pronouncements in *LaGrand* and *Avena*, and nonetheless concluded that Medellín's treaty claim lacked the requisite merit for a COA.

We granted certiorari on two questions. First, does *Avena* have preclusive effect in our courts? Second, if our courts are not bound to apply *Avena* as a rule of decision, must they give the ICJ's decision effect for sake of uniform treaty interpretation or comity? These questions refer to substantial, debatable issues in Medellín's Vienna Convention claim. I would therefore vacate the denial of a COA and remand for further proceedings.

## II

### A

At every step, the federal courts must evaluate Medellín's Vienna Convention claim through the framework of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which controls the process by which a state prisoner may obtain federal habeas relief. And wherever the Convention, which has been in continuous force since 1969, conflicts with this subsequently enacted statute, the statute must govern. *Reid* v. *Covert*, 354 U. S. 1, 18 (1957) (plurality opinion); see also *Whitney* v. *Robertson*, 124 U. S. 190, 194 (1888).

At the outset, Texas and the United States argue that AEDPA, 28 U. S. C. § 2253(c), precludes ruling for Medellín no matter how meritorious his Vienna Convention claim may be. According to § 2253(c)(2), a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." Texas maintains that prisoners may only appeal district courts' adverse decisions involving constitutional rights—that Congress did not use the word "con-

stitutional" in the statute as shorthand for all of the federal claims traditionally heard in habeas. But see 1 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure 448–449 (4th ed. 2001). See also *Slack, supra*, at 483 (noting Congress' substitution of "'constitutional'" for "'federal'" in the standard for obtaining a certificate of probable cause—the COA's predecessor—without saying if the change is meaningful).

Texas concedes that it raised this objection for the first time in its merits brief to this Court. Tr. of Oral Arg. 29. Normally this Court will not decide a question raised at this stage. See *Taylor* v. *Freeland & Kronz*, 503 U. S. 638, 645–646 (1992). But Texas contends that this is a nonwaivable jurisdictional objection. So we must start with the question of whether it actually is an objection that cannot be waived. It is true that the COA is jurisdictional in the sense that it is a "gateway" device. *Miller-El* v. *Cockrell*, 537 U. S. 322, 337 (2003). By obliging applicants to make a threshold showing before their cases are aired out on appeal, the COA serves an important screening function and conserves the resources of appellate courts. To that end, the existence of a COA is jurisdictional insofar as a prisoner cannot appeal in habeas without one. See *id.*, at 335–336. Accordingly, a federal court must verify that a COA has issued before hearing the merits of a habeas appeal.

It does not follow, however, that courts must raise and decide predicate arguments about the validity of a COA independently, without prompting from the parties, even when ordinary waiver rules would apply, as they must with true jurisdictional arguments. If that were so, an appellate court, presiding over an appeal after the district court had issued a COA, would always be required to check that a "substantial showing" had been made and a cognizable right asserted—even in the absence of controversy between the parties. We have never imposed such a rule, and it would undermine the efficiency of the COA process. Cf. *Young* v.

*United States*, 124 F. 3d 794, 799 (CA7 1997). Predicate considerations for a COA—whether a "substantial showing" has been made or a "constitutional right" asserted—are not the sorts of considerations that remain open for review throughout the entire case. Compare *Peguero* v. *United States*, 526 U. S. 23 (1999) (considering whether a violation of Federal Rule of Criminal Procedure 32(a)(2) provided a basis for collateral relief), with Brief for United States in *Peguero* v. *United States*, O. T. 1998, No. 97–9217, p. 6, n. 5 (arguing that § 2253(c) deprived the Court of jurisdiction because a constitutional right was not at stake). Thus, because Texas did not argue below that a treaty-based claim cannot support an application for a COA, it cannot raise the argument now.

Texas also adverts to another AEDPA provision, 28 U. S. C. § 2254(d), which it says is fatal to Medellín's treaty claim. The statute provides that a writ of habeas corpus shall not issue on behalf of a person in state custody with respect to any claim "adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Whether Medellín's claim clears these hurdles is an appropriate consideration for an appellate court contemplating whether to grant a COA, and for this Court reviewing the denial of a COA. See *Miller-El*, 537 U. S., at 349–350 (SCALIA, J., concurring) ("A circuit justice or judge must deny a COA . . . if all reasonable jurists would conclude that a substantive provision of the federal habeas statute bars relief"); see also *id.*, at 336 (majority opinion).

The Texas court's disposition of Medellín's Vienna Convention claim is not entitled to deference under § 2254(d), and thus should not constrain a final decision in federal court about whether he deserves habeas relief. The Texas court gave two reasons for dismissing the claim. First, it applied its procedural default rule to Medellín's assertion of right

under the Vienna Convention. See *supra*, at 675. In so doing, it did not adjudicate the merits of the relevant federal question—whether, under Article 36(2), the treaty overrides state procedural default rules. Second, the Texas court appears to have reasoned that private individuals (as opposed to offended nations) can never enforce any treaty in court. See *supra*, at 675–676. This reasoning is "contrary to" our precedents and, therefore, is not entitled to deference in subsequent federal proceedings. "A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases." *Williams* v. *Taylor*, 529 U. S. 362, 405 (2000); see also *Brown* v. *Payton*, *ante*, at 141. The Texas court's blanket rule plainly contradicts our governing law, for it is axiomatic that, while treaties are compacts between nations, "a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country." *Head Money Cases*, 112 U. S. 580, 598 (1884). The Texas court neither asked nor answered the right question: whether an individual can bring a claim under *this* particular treaty. Accordingly, any consideration of Medellín's Vienna Convention claim for habeas relief in federal court—including his assertion that *Avena* provides a binding rule of decision—must proceed *de novo*. See *Williams*, *supra*, at 406.

B

The Court catalogs a number of other, nonjurisdictional questions that, in its view, justify dismissing the case because they could preclude ultimate habeas relief for Medellín. *Ante*, at 664–666. Apparently the Court agrees that it would be impossible or imprudent to decide these questions today. It seems odd to me to leave them undecided and yet to rely on them as reason to avoid the weighty questions that

*are* undeniably properly before us. Given the posture of this case, our modest task is to decide only whether Medellín has presented claims worthy of a COA, and the majority points to issues outside the scope of that inquiry. Anyway, it is not our practice generally, when remanding a case to the lower courts after resolving discrete questions, to canvass all of the possible permutations of what could happen before a final resolution. Thus, while the Court points to questions that are, of course, important, none ought to detain us here.

First, Texas and the United States have made no mention of *Reed* v. *Farley*, 512 U. S. 339 (1994), and *Hill* v. *United States*, 368 U. S. 424 (1962), depriving Medellín of an opportunity to discuss their applicability to his case—a complicated question. Second, while Texas did argue in its certiorari papers that Medellín had already received a prejudice analysis in state habeas, see Brief in Opposition 14–16, it abandoned this argument in its brief on the merits. See *United States* v. *International Business Machines Corp.*, 517 U. S. 843, 855, n. 3 (1996) (the Court does not address abandoned arguments). Here, Texas argues that Medellín cannot show prejudice in a *future* proceeding, not that he has already failed to show prejudice or that the state court thought (not unreasonably) that the Vienna Convention had been satisfied by its prejudice analysis. See Brief for Respondent 16–17. Moreover, Medellín has maintained an unfulfilled request for an evidentiary hearing about prejudice. The ICJ, for its part, appears to believe that Medellín has yet to receive the prejudice analysis that the Vienna Convention requires; otherwise, it would not have ruled—after the state habeas proceedings had concluded—that the United States must still provide "review and reconsideration" of his sentence to determine if he suffered "actual prejudice." *Avena*, 2004 I. C. J. No. 128, ¶¶ 121–122, 153. Third, the Court is correct to observe that, before obtaining relief, Medellín would have to contend with *Teague* v. *Lane*, 489 U. S. 288 (1989). The Court of Appeals never discussed *Teague*'s applicability to

Medellín's case. Whether *Teague* bars relief for Medellín is itself a highly debatable question that should be part of a proper COA analysis upon remand.

## III

"While a COA ruling is not the occasion for a ruling on the merit of petitioner's claim," *Miller-El*, 537 U. S., at 331, some assessment of Medellín's arguments is necessary to explain why the COA's denial should be vacated.

### A

The Optional Protocol to the Vienna Convention provides that "[d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, Art. I, [1970] 21 U. S. T. 326, T. I. A. S. No. 6820 (hereinafter Optional Protocol). The United States was party to the Optional Protocol until recently. See Letter from Condoleezza Rice, Secretary of State, to Kofi A. Annan, Secretary-General of the United Nations (Mar. 7, 2005) (notifying the Secretary-General that the United States hereby withdraws from the Optional Protocol). And the ICJ decided *LaGrand* and *Avena* pursuant to the Optional Protocol's grant of authority. The first question on which we granted certiorari asks whether American courts are now bound to follow the ICJ's decision in *Avena* when deciding Vienna Convention claims.[1]

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[1] The Court suggests that Medellín's reliance on *Avena* may be a distinct claim, and that he may not have properly exhausted it in state court. *Ante*, at 666. But Medellín has maintained a single claim throughout the state and federal habeas proceedings—that Texas violated his rights under the Vienna Convention and that he is entitled to a remedy for that violation. Pointing to *Avena* as a rule of decision for the adjudication of that claim is akin to pointing to a new decision from this Court to bolster

If Medellín is right to say that they must, then the District Court's resolution of his Vienna Convention claim is not merely debatable, but wrong in result and in reasoning. In terms of result, the ICJ made clear that it would be improper to dismiss Medellín's claim, for once the United States had committed "internationally wrongful acts," the necessary "remedy to make good these violations should consist in an obligation on the United States to permit review and reconsideration of [the 51 Mexican] nationals' cases by the United States courts." *Avena*, 2004 I. C. J. No. 128, ¶ 121. The ICJ's reasoning is also irreconcilable with the District Court's. The ICJ specified that the Convention confers rights on individual defendants, and that applying state procedural default rules to prevent them from vindicating their rights violates the treaty, for the treaty requires that its purposes be given "'full effect.'" *Id.*, ¶¶ 106, 113.

Medellín argues that once the United States undertakes a substantive obligation (as it did in the Vienna Convention), and at the same time undertakes to abide by the result of a specified dispute resolution process (as it did by submitting to the ICJ's jurisdiction through the Optional Protocol), it is bound by the rules generated by that process no less than it is by the treaty that is the source of the substantive obligation. In other words, because *Avena* was decided on the back of a self-executing treaty, see *infra*, at 686, it must be given effect in our domestic legal system just as the treaty itself must be. Medellín asserts, at bottom, that *Avena*, like a treaty, has the status of supreme law of the land.

On the other hand, Texas and the United States argue that the issue turns in large part on how to interpret Article 94(1) of the United Nations Charter, which provides that "[e]ach Member of the United Nations undertakes to comply with

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an existent claim for relief. In neither case has petitioner made a new claim as opposed to a new argument supporting his pending claim. Cf. *Yee* v. *Escondido*, 503 U. S. 519, 534–535 (1992).

the decision of the International Court of Justice in any case to which it is a party." 59 Stat. 1051. They maintain that the charter imposes an international duty only on our political branches. A contrary result could deprive the Executive of necessary discretion in foreign relations, and may improperly displace this Court's responsibilities to an international body. For his part, Medellín says that Article 94(1) cannot answer the question of whether, under domestic law and the Supremacy Clause, our courts are bound to comply with the international obligation reflected in *Avena*.

The Court of Appeals passed on whether it was bound by *Avena*, and decided that the issue was not worthy of a COA. In so doing, it noted some conflict between *Avena* and our decision in *Breard* v. *Greene*, 523 U. S. 371, 376 (1998) *(per curiam)*. How to resolve that conflict is a difficult question. Reasonable jurists can vigorously disagree about whether and what legal effect ICJ decisions have in our domestic courts, and about whether Medellín can benefit from such effect in this posture. The Court of Appeals should have granted a COA and given the issue further consideration.

B

We also granted certiorari on a second, alternative question that asks whether and what weight American courts should give to *Avena*, perhaps for sake of uniform treaty interpretation, even if they are not bound to follow the ICJ's decision. That question can only be answered by holding up the *Avena* interpretation of the treaty against the domestic court's own conclusions, and then deciding how and to what extent the two should be reconciled. See *Olympic Airways* v. *Husain*, 540 U. S. 644, 660–661 (2004) (SCALIA, J., dissenting); *Air France* v. *Saks*, 470 U. S. 392, 404 (1985). Accordingly, the second question presented encompassed two other issues, both pressed and passed upon below, that are themselves debatable and thus grounds for a COA: whether the

Vienna Convention creates judicially enforceable rights and whether it sometimes trumps state procedural default rules.[2]

This Court has remarked that Article 36 of the Vienna Convention "arguably confers on an individual the right to consular assistance following arrest." *Breard*, *supra*, at 376. The United States maintains, on the contrary, that Article 36 does not give foreign nationals a judicially enforceable right to consular access. On that theory, a detained foreign national may *never* complain in court—even in the course of a trial or on direct review—about a State's failure to "inform the person concerned without delay of his rights under" Article 36. 21 U. S. T., at 101. The complainant must be the sending state, and any remedy is political, diplomatic, or between the states in international law.

When called upon to interpret a treaty in a given case or controversy, we give considerable weight to the Executive Branch's understanding of our treaty obligations. See *Kolovrat* v. *Oregon*, 366 U. S. 187, 194 (1961); *Charlton* v. *Kelly*, 229 U. S. 447, 468 (1913). But a treaty's meaning is not be-

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[2] JUSTICE GINSBURG gives an unduly narrow construction to the second question presented. It asks: "[S]hould a court in the United States give effect to the judgments in *Avena* and *LaGrand*"? Brief for Petitioner i. This question cannot be read to ask for "'effect'" to be given in the strict sense of the law of judgments, *ante*, at 670–671 (GINSBURG, J., concurring): Because Medellín was not a beneficiary of the judgment in *LaGrand Case (F. R. G.* v. *U. S.)*, 2001 I. C. J. 466 (Judgment of June 27), a case between Germany and the United States, the judgment in *LaGrand* cannot be enforced as to Medellín. What he asks is that American courts reach the same interpretation of the Vienna Convention as did the body charged with adjudicating international disputes arising out of the Convention—in part for the sake of "uniform treaty interpretation." Brief for Petitioner i. This understanding of the second question takes account, as it should, of the fact that the correct, independent interpretation of the Vienna Convention was the central question in the habeas proceedings below. Moreover, it is consistent with the practical way we decide what is "fairly included" in a question presented. See this Court's Rule 14.1(a); *City of Sherrill* v. *Oneida Indian Nation of N. Y.*, *ante*, at 213, n. 6; *Ballard* v. *Commissioner*, *ante*, at 47, n. 2.

yond debate once the Executive has interpreted it. Cf., *e. g.*, *Chan* v. *Korean Air Lines, Ltd.*, 490 U. S. 122, 136 (1989) (Brennan, J., concurring in judgment) (observing that the Court was rejecting a view of the Warsaw Convention that had consistently been adopted by the Executive Branch and had been pressed by the United States in that case); *Perkins* v. *Elg*, 307 U. S. 325, 328, 337–342 (1939) (declining to adopt Executive's treaty interpretation); *Johnson* v. *Browne*, 205 U. S. 309, 319–321 (1907) (same); *De Lima* v. *Bidwell*, 182 U. S. 1, 181, 194–199 (1901) (same).

Article 36 of the Vienna Convention on Consular Relations is, as the United States recognizes, a self-executing treaty. Brief for United States as *Amicus Curiae* 26. Chief Justice Marshall explained that a self-executing treaty is domestic law. It "operates of itself," as "a rule for the Court," "equivalent to an act of the legislature." *Foster* v. *Neilson*, 2 Pet. 253, 314 (1829). Because the Convention is self-executing, then, its guarantees are susceptible to judicial enforcement just as the provisions of a statute would be. See *Head Money Cases*, 112 U. S., at 598–599 ("A treaty, then, is a law of the land as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute"); see generally L. Henkin, Foreign Affairs and the United States Constitution 206–209 (2d ed. 1996).

To ascertain whether Article 36 confers a right on individuals, we first look to the treaty's text as we would with a statute's. *United States* v. *Alvarez-Machain*, 504 U. S. 655, 663 (1992); *Air France*, *supra*, at 397. Article 36(1)(b) entails three different obligations for signatory host countries. Their competent authorities shall (1) inform the consul of its nationals' detentions, (2) forward communication from a detained national to his consulate, and (3) "inform the person

concerned without delay of *his rights under this subparagraph.*" 21 U. S. T., at 101 (emphasis added). Of these, the third exclusively concerns the detained individual, and it is the only obligation expressed in the language of rights. If Article 36(1) conferred no rights on the detained individual, its command to "inform" the detainee of "his rights" might be meaningless. Other provisions in the treaty appear to refer back to individual rights. See Art. 36(1)(a), *ibid.*; Art. 36(2), *ibid.*

To be sure, the questions of whether a treaty is self-executing and whether it creates private rights and remedies are analytically distinct. If Article 36(1)(b) imposed only two obligations on signatory countries—to notify the consul and forward correspondence—then Medellín could not invoke the treaty as a source of personal rights by virtue of its self-executing character. But the treaty goes further—imposing an obligation to inform the individual of his rights in the treaty. And if a statute were to provide, for example, that arresting authorities "shall inform a detained person without delay of his right to counsel," I question whether more would be required before a defendant could invoke that statute to complain in court if he had not been so informed.

This Court has repeatedly enforced treaty-based rights of individual foreigners, allowing them to assert claims arising from various treaties. These treaties, often regarding reciprocity in commerce and navigation, do not share any special magic words. Their rights-conferring language is arguably no clearer than the Vienna Convention's is, and they do not specify judicial enforcement. See, *e. g.*, *Asakura* v. *Seattle*, 265 U. S. 332, 340 (1924) (allowing Japanese national to bring a claim under a United States-Japan treaty requiring that "'citizens or subjects of each of the [two countries] shall have liberty . . . to carry on trade'" in the other's territory, and holding that a local licensing ordinance for pawnbrokers could not be applied to the Japanese petitioner without violating the treaty's guarantee); *Kolovrat*, *supra*, at 191–192,

and n. 6 (sustaining Yugoslavians' claim against enforcement of Oregon inheritance law limiting their right to inherit, when United States-Serbia Treaty promised that "'[i]n all that concerns the right of acquiring, possessing or disposing of every kind of property . . . citizens of [each country in the other] shall enjoy the rights which the respective laws grant in each of these states to the subjects of the most favored nation'").

Likewise, the United States acknowledges with approval that other provisions of the Vienna Convention, which relate to consular privileges and immunities, have been the source of judicially enforced individual rights. See Brief for United States as *Amicus Curiae* 26, n. 7 (citing *Risk* v. *Halvorsen*, 936 F. 2d 393, 397 (CA9 1991) (deciding whether Article 43 of the Vienna Convention defeated jurisdiction under 28 U. S. C. § 1351 over defendant consular officials), and *Gerritsen* v. *de la Madrid Hurtado*, 819 F. 2d 1511, 1515–1516 (CA9 1987) (same)). Although Article 43 is phrased in terms of courts' jurisdiction, its violations could theoretically also be vindicated exclusively in political and diplomatic processes, but have not been. See Art. 43(1), 21 U. S. T., at 104 ("Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions"); see also *Kolovrat*, 366 U. S., at 193; *Hauenstein* v. *Lynham*, 100 U. S. 483, 487 (1880).

There are plausible arguments for the Government's construction of Article 36. See generally *Choctaw Nation* v. *United States*, 318 U. S. 423, 431–432 (1943) (looking to extrinsic sources for treaty interpretation). The preamble to the Vienna Convention, for example, states that "the purpose of such privileges and immunities [contained in the treaty] is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States." 21 U. S. T., at 79. Moreover, State Depart-

ment and congressional statements contemporaneous with the treaty's ratification say or indicate that the Convention would not require significant departures from existing practice. See *United States* v. *Li*, 206 F. 3d 56, 64–65 (CA1 2000); but see *id.*, at 73–75 (Torruella, C. J., concurring in part and dissenting in part). The United States interprets such statements to mean that the political branches did not contemplate a role for the treaty in ordinary criminal proceedings. See Brief for United States as *Amicus Curiae* 21–22. The Government also asserts that the State Department's previous litigation behavior in Article 36 cases is consistent with the Executive's treaty interpretation presented here. *Id.*, at 22–23; see also *Li*, *supra*, at 64. I would allow fuller consideration of this issue upon the granting of a COA.

Of course, even if the Convention does confer individual rights, there remains the question of whether such rights can be forfeited according to state procedural default rules. Article 36(2) of the treaty provides: "The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." 21 U. S. T., at 101. Medellín contends that this provision requires that state procedural default rules sometimes be set aside so that the treaty can be given "full effect." *Ibid.* In *Breard*, in the course of denying a stay of imminent execution and accompanying petitions, we concluded that the petitioner had defaulted his Article 36 claim by failing to raise it in state court prior to seeking collateral relief in federal court. 523 U. S., at 375–376. Subsequently in *Avena*, as explained above, the ICJ interpreted Article 36(2) differently. 2004 I. C. J. No. 128, ¶¶ 112–113. In the past the Court has revisited its interpretation of a treaty when new international law has come to light. See *United States* v. *Percheman*, 7 Pet. 51, 89 (1833). Even if *Avena* is not

itself a binding rule of decision in this case, it may at least be occasion to return to the question of Article 36(2)'s implications for procedural default.

Again, I would not decide that question today. All that is required of Medellín now is to show that his case is debatable. He has done at least that much. Because of the COA posture, we cannot, and I would not, construe Article 36 definitively here. I would conclude only that Medellín's arguments about the treaty themselves warrant a COA.

## IV

For the reasons explained, I would vacate the Court of Appeals' decision to deny Medellín a COA with which to proceed, and remand for further proceedings. After we granted certiorari in this case, the President informed his Attorney General that the United States would discharge its obligations under the *Avena* judgment "by having State courts give effect to the decision." George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005), App. 2 to Brief for United States as *Amicus Curiae* 9a. Medellín has since filed a successive petition in state court. It is possible that the Texas court will grant him relief on the basis of the President's memorandum. On remand, the Court of Appeals for the Fifth Circuit may have wished to consider that possibility when scheduling further federal proceedings, and to hold the case on its docket until Medellín's successive petition was resolved in state court. See *Landis* v. *North American Co.*, 299 U. S. 248, 254 (1936).

JUSTICE SOUTER, dissenting.

After the Court of Appeals denied the certificate of appealability (COA) necessary for Medellín to appeal the District Court's denial of his claim for relief under the Vienna Convention on Consular Relations, we granted certiorari on two questions bearing on the order barring further appeal: (1) whether the judgment of the International Court of Jus-

tice (ICJ) in *Case Concerning Avena and other Mexican Nationals (Mex.* v. *U. S.)*, 2004 I. C. J. No. 128 (Judgment of Mar. 31) *(Avena)*, supporting petitioner's right to litigate a claimed violation of the Convention, and to litigate free of state and federal procedural bars, is preclusive in our domestic courts; and (2) whether *Avena* and the ICJ's earlier judgment in *LaGrand Case (F. R. G.* v. *U. S.)*, 2001 I. C. J. 466 (Judgment of June 27), are at least entitled to enforcement for the sake of comity or uniform treaty interpretation. Prior to argument here, the President advised the Attorney General that the United States would discharge its international obligations under the *Avena* judgment "by having State courts give effect to the decision." Memorandum for the Attorney General (Feb. 28, 2005), App. 2 to Brief for United States as *Amicus Curiae* 9a. Medellín accordingly has gone back to state court in Texas to seek relief on the basis of the *Avena* judgment and the President's determination. Since action by the Texas courts could render moot the questions on which we granted certiorari (not to mention the subsidiary issues spotted in the *per curiam* and dissenting opinions), I think the best course for this Court would be to stay further action for a reasonable time as the Texas courts decide what to do; that way we would not wipe out the work done in this case so far, and we would not decide issues that may turn out to require no action. We would, however, remain in a position to address promptly the Nation's obligation under the judgment of the ICJ if that should prove necessary.

Because a majority of the Court does not agree to a stay, I think the next best course would be to take up the questions on which certiorari was granted, to the extent of their bearing on the conclusion of the Court of Appeals that there was no room for reasonable disagreement, meriting a COA, about Medellín's right to relief under the Convention. The Court of Appeals understandably thought itself constrained by our decision in *Breard* v. *Greene*, 523 U. S. 371 (1998) *(per*

*curiam)*, which the court viewed as binding until this Court said otherwise. It is of course correct to face the possibility of saying otherwise today, since Medellín's case now presents a Vienna Convention claim in the shadow of a final ICJ judgment that may be entitled to considerable weight, if not preclusive effect. This case is therefore not *Breard*, and the Court of Appeals should be free to take a fresh look.

That is one of several reasons why I join JUSTICE O'CONNOR's dissenting opinion, but I do so subject to caveats. We should not at this point limit the scope of proceedings on remand; the issues outlined in Part III–B of JUSTICE O'CONNOR's opinion are implicated here by Medellín's request that domestic courts defer to the ICJ for the sake of uniform treaty interpretation. Whether these issues would be open for consideration by the Court of Appeals in their own right, independent of the ICJ's judgment, is not before us here, nor should our discussion of them and other matters in Part III be taken as limiting the enquiry by the Court of Appeals, were a remand possible. I would, however, limit further proceedings by providing that the Court of Appeals should take no further action until the anticipated Texas litigation responding to the President's position had run its course, since action in the Texas courts might remove any occasion to proceed under the federal habeas petition. Taking JUSTICE O'CONNOR's proposed course subject to this limitation would eliminate the risk of further unnecessary federal rulings, but would retain federal jurisdiction and the option to act promptly, which petitioner deserves after litigating this far.

JUSTICE BREYER, with whom JUSTICE STEVENS joins, dissenting.

I agree with JUSTICE GINSBURG that, in light of recent developments, this Court should simply grant Medellín's motion for a stay. See *ante*, at 668 (concurring opinion); see

also *ante*, at 691 (SOUTER, J., dissenting). But, in the absence of majority support for a stay, I would vacate the Fifth Circuit's judgment and remand the case rather than simply dismiss the writ as improvidently granted. I join JUSTICE O'CONNOR's dissent, for she would do the same. See *ante*, at 677, 690.

For one thing, Medellín's legal argument that "American courts are now bound to follow the ICJ's decision in *Avena*" is substantial, and the Fifth Circuit erred in holding the contrary. *Ante*, at 682 (O'CONNOR, J., dissenting); see 371 F. 3d 270, 279–280 (2004). By vacating its judgment and remanding the case, we would remove from the books an erroneous legal determination that we granted certiorari to review.

Nor would a remand "invite the Fifth Circuit to conduct proceedings rival to those" unfolding in the Texas courts. *Ante*, at 668 (GINSBURG, J., concurring). Rather, I should expect the Fifth Circuit to recognize two practical circumstances that favor its entering a stay. See *ante*, at 690 (O'CONNOR, J., dissenting); see also *ante*, at 692 (SOUTER, J., dissenting).

First, the President has decided that state courts should follow *Avena*. See *Case Concerning Avena and Other Mexican Nationals (Mex.* v. *U. S.)*, 2004 I. C. J. No. 128 (Judgment of Mar. 31); George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005), App. 2 to Brief for United States as *Amicus Curiae* 9a. And that fact permits Medellín to argue in the Texas courts that the President's determination—taken together with (1) the self-executing nature of the treaty, (2) the Nation's signature on the Optional Protocol, (3) the International Court of Justice's (ICJ) determination that the United States give Medellín (and 50 other Mexican nationals) "*judicial*," *i. e.*, court, "review and reconsideration" of their Convention-based claims, "by means of [the United States'] own choosing," and (4) the United States' "undertak[ing]" in the United Nations Charter to

comply with ICJ judgments—requires Texas to follow the *Avena* decision in Medellín's case. *Avena*, *supra*, ¶¶ 138–143, 153(9) (emphasis added); Charter of the United Nations, Art. 94.1, 59 Stat. 1051; cf. *Ware* v. *Hylton*, 3 Dall. 199, 237 (1796) (treaties "superior to the Constitution and laws of any individual state" (emphasis deleted)); *Sale* v. *Haitian Centers Council, Inc.*, 509 U. S. 155, 188 (1993) (President possesses "unique responsibility" for the conduct of "foreign . . . affairs"); see also *American Ins. Assn.* v. *Garamendi*, 539 U. S. 396, 414–416 (2003) (President has a degree of independent authority to pre-empt state law); Tex. Code Crim. Proc. Ann., Arts. 11.01, 11.071 (Vernon 2005) (Texas courts possess jurisdiction to hear Medellín's claims).

Second, several Members of this Court have confirmed that the federal questions implicated in this case are important, thereby suggesting that further review here after the Texas courts reach their own decisions may well be appropriate. See *ante*, at 672 (GINSBURG, J., concurring) (it is "this Court's responsibility" to address and resolve any significant legal ICJ-related issues that may arise in the state-court proceedings).

The first consideration means that Medellín's claims when considered in state court are stronger than when considered in federal court—and suggests the very real possibility of his victory in state court. The second consideration means that a loss in state court would likely be followed by review in this Court. Taken together they mean that, by staying the case on remand, the Fifth Circuit could well avoid the need for any further federal proceedings, or at least obtain additional guidance from this Court before taking further action. Given these practical circumstances, it seems to me unlikely that, were we to remand this case, the Fifth Circuit would move forward on its own, rather than stay its hand until the conclusion of proceedings in the state courts and possibly here.

For these reasons and those set forth by JUSTICE O'CONNOR, I agree with the course of action she suggests and respectfully dissent from the Court's decision to dismiss the writ.

Syllabus

# ARTHUR ANDERSEN LLP *v.* UNITED STATES

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 04–368. Argued April 27, 2005—Decided May 31, 2005

As Enron Corporation's financial difficulties became public, petitioner, Enron's auditor, instructed its employees to destroy documents pursuant to its document retention policy. Petitioner was indicted under 18 U. S. C. §§ 1512(b)(2)(A) and (B), which make it a crime to "knowingly . . . corruptly persuad[e] another person . . . with intent to . . . cause" that person to "withhold" documents from, or "alter" documents for use in, an "official proceeding." The jury returned a guilty verdict, and the Fifth Circuit affirmed, holding that the District Court's jury instructions properly conveyed the meaning of "corruptly persuades" and "official proceeding" in § 1512(b); that the jury need not find any consciousness of wrongdoing in order to convict; and that there was no reversible error.

*Held:* The jury instructions failed to convey properly the elements of a "corrup[t] persua[sion]" conviction under § 1512(b). Pp. 703–708.

(a) This Court's traditional restraint in assessing federal criminal statutes' reach, see, *e. g., United States* v. *Aguilar*, 515 U. S. 593, 600, is particularly appropriate here, where the act underlying the conviction—"persua[sion]"—is by itself innocuous. Even "persuad[ing]" a person "with intent to . . . cause" that person to "withhold" testimony or documents from the Government is not inherently malign. Under ordinary circumstances, it is not wrongful for a manager to instruct his employees to comply with a valid document retention policy, even though the policy, in part, is created to keep certain information from others, including the Government. Thus, § 1512(b)'s "knowingly . . . corruptly persuades" phrase is key to what may or may not lawfully be done in the situation presented here. The Government suggests that "knowingly" does not modify "corruptly persuades," but that is not how the statute most naturally reads. "[K]nowledge" and "knowingly" are normally associated with awareness, understanding, or consciousness, and "corrupt" and "corruptly" with wrongful, immoral, depraved, or evil. Joining these meanings together makes sense both linguistically and in the statutory scheme. Only persons conscious of wrongdoing can be said to "knowingly . . . corruptly persuad[e]." And limiting criminality to persuaders conscious of their wrongdoing sensibly allows § 1512(b) to reach

only those with the level of culpability usually required to impose criminal liability. See *Aguilar, supra*, at 602. Pp. 703–706.

(b) The jury instructions failed to convey the requisite consciousness of wrongdoing. Indeed, it is striking how little culpability the instructions required. For example, the jury was told that, even if petitioner honestly and sincerely believed its conduct was lawful, the jury could convict. The instructions also diluted the meaning of "corruptly" such that it covered innocent conduct. The District Court based its instruction on the Fifth Circuit Pattern Jury Instruction for § 1503, which defined "corruptly" as "knowingly and dishonestly, with the specific intent to subvert or undermine the integrity" of a proceeding. However, the court agreed with the Government's insistence on excluding "dishonestly" and adding the term "impede" to the phrase "subvert or undermine," so the jury was told to convict if it found petitioner intended to "subvert, undermine, or impede" governmental factfinding by suggesting to its employees that they enforce the document retention policy. These changes were significant. "[D]ishonest[y]" was no longer necessary to a finding of guilt, and it was enough for petitioner to have simply "impede[d]" the Government's factfinding ability. "Impede" has broader connotations than "subvert" or even "undermine," and many of these connotations do not incorporate any "corrupt[ness]" at all. Under the dictionary definition of "impede," anyone who innocently persuades another to withhold information from the Government "get[s] in the way of the progress of" the Government. With regard to such innocent conduct, the "corruptly" instructions did no limiting work whatsoever. The instructions also led the jury to believe that it did not have to find *any* nexus between the "persua[sion]" to destroy documents and any particular proceeding. In resisting any nexus element, the Government relies on § 1512(e)(1), which states that an official proceeding "need not be pending or about to be instituted at the time of the offense." It is, however, quite another thing to say a proceeding need not even be foreseen. A "knowingly . . . corrup[t] persaude[r]" cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material. Cf. *Aguilar, supra*, at 599–600. Pp. 706–708.

374 F. 3d 281, reversed and remanded.

REHNQUIST, C. J., delivered the opinion for a unanimous Court.

*Maureen E. Mahoney* argued the cause for petitioner. With her on the briefs were *Alexandra A. E. Shapiro*, *J. Scott Ballenger*, and *Charles A. Rothfeld*.

*Deputy Solicitor General Dreeben* argued the cause for the United States. With him on the brief were *Acting Solicitor General Clement, Acting Assistant Attorney General Keeney, Kannon K. Shanmugam, Sangita K. Rao, Andrew Weissmann,* and *Matthew W. Friedrich.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

As Enron Corporation's financial difficulties became public in 2001, petitioner Arthur Andersen LLP, Enron's auditor, instructed its employees to destroy documents pursuant to its document retention policy. A jury found that this action made petitioner guilty of violating 18 U. S. C. §§ 1512(b)(2)(A) and (B). These sections make it a crime to "knowingly us[e] intimidation or physical force, threate[n], or corruptly persuad[e] another person . . . with intent to . . . cause" that person to "withhold" documents from, or "alter" documents for use in, an "official proceeding."[1] The Court of Appeals for the Fifth Circuit affirmed. We hold that the jury instructions failed to convey properly the elements of a "corrup[t] persua[sion]" conviction under § 1512(b), and therefore reverse.

Enron Corporation, during the 1990's, switched its business from operation of natural gas pipelines to an energy conglomerate, a move that was accompanied by aggressive accounting practices and rapid growth. Petitioner audited Enron's publicly filed financial statements and provided internal audit and consulting services to it. Petitioner's "en-

*Briefs of *amici curiae* urging reversal were filed for the American Institute of Certified Public Accountants by *Kelly M. Hnatt* and *Richard I. Miller;* for the New York Council of Defense Lawyers by *Lewis J. Liman;* and for the Washington Legal Foundation et al. by *Carter G. Phillips, Virginia A. Seitz, Daniel J. Popeo,* and *Paul D. Kamenar.*

*Robert N. Weiner* and *Joshua L. Dratel* filed a brief for the National Association of Criminal Defense Lawyers as *amicus curiae.*

[1] We refer to the 2000 version of the statute, which has since been amended by Congress.

gagement team" for Enron was headed by David Duncan. Beginning in 2000, Enron's financial performance began to suffer, and, as 2001 wore on, worsened.[2] On August 14, 2001, Jeffrey Skilling, Enron's Chief Executive Officer (CEO), unexpectedly resigned. Within days, Sherron Watkins, a senior accountant at Enron, warned Kenneth Lay, Enron's newly reappointed CEO, that Enron could "implode in a wave of accounting scandals." Brief for United States 2. She likewise informed Duncan and Michael Odom, one of petitioner's partners who had supervisory responsibility over Duncan, of the looming problems.

On August 28, an article in the Wall Street Journal suggested improprieties at Enron, and the SEC opened an informal investigation. By early September, petitioner had formed an Enron "crisis-response" team, which included Nancy Temple, an in-house counsel.[3] On October 8, petitioner retained outside counsel to represent it in any litigation that might arise from the Enron matter. The next day, Temple discussed Enron with other in-house counsel. Her notes from that meeting reflect that "some SEC investigation" is "highly probable." *Id.*, at 3.

On October 10, Odom spoke at a general training meeting attended by 89 employees, including 10 from the Enron en-

[2] During this time, petitioner faced problems of its own. In June 2001, petitioner entered into a settlement agreement with the Securities and Exchange Commission (SEC) related to its audit work of Waste Management, Inc. As part of the settlement, petitioner paid a massive fine. It also was censured and enjoined from committing further violations of the securities laws. In July 2001, the SEC filed an amended complaint alleging improprieties by Sunbeam Corporation, and petitioner's lead partner on the Sunbeam audit was named.

[3] A key accounting problem involved Enron's use of "Raptors," which were special purpose entities used to engage in "off-balance-sheet" activities. Petitioner's engagement team had allowed Enron to "aggregate" the Raptors for accounting purposes so that they reflected a positive return. This was, in the words of petitioner's experts, a "black-and-white" violation of Generally Accepted Accounting Principles. Brief for United States 2.

gagement team. Odom urged everyone to comply with the firm's document retention policy.[4] He added: "'[I]f it's destroyed in the course of [the] normal policy and litigation is filed the next day, that's great. . . . [W]e've followed our own policy, and whatever there was that might have been of interest to somebody is gone and irretrievable.'" 374 F. 3d 281, 286 (CA5 2004). On October 12, Temple entered the Enron matter into her computer, designating the "Type of Potential Claim" as "Professional Practice—Government/Regulatory Inv[estigation]." App. JA–127. Temple also e-mailed Odom, suggesting that he "'remin[d] the engagement team of our documentation and retention policy.'" Brief for United States 6.

On October 16, Enron announced its third quarter results. That release disclosed a $1.01 billion charge to earnings.[5] The following day, the SEC notified Enron by letter that it had opened an investigation in August and requested certain information and documents. On October 19, Enron forwarded a copy of that letter to petitioner.

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[4] The firm's policy called for a single central engagement file, which "should contain only that information which is relevant to supporting our work." App. JA–45. The policy stated that, "[i]n cases of threatened litigation, . . . no related information will be destroyed." *Id.*, at JA–44. It also separately provided that, if petitioner is "advised of litigation or subpoenas regarding a particular engagement, the related information should not be destroyed. See Policy Statement No. 780—Notification of Litigation." *Id.*, at JA–65 (emphasis deleted). Policy Statement No. 780 set forth "notification" procedures for whenever "professional practice litigation against [petitioner] or any of its personnel has been commenced, has been threatened or is judged likely to occur, or when governmental or professional investigations that may involve [petitioner] or any of its personnel have been commenced or are judged likely." *Id.*, at JA–29 to JA–30.

[5] The release characterized the charge to earnings as "non-recurring." Brief for United States 6, n. 4. Petitioner had expressed doubts about this characterization to Enron, but Enron refused to alter the release. Temple wrote an e-mail to Duncan that "suggested deleting some language that might suggest we have concluded the release is misleading." App. JA–95.

On the same day, Temple also sent an e-mail to a member of petitioner's internal team of accounting experts and attached a copy of the document policy. On October 20, the Enron crisis-response team held a conference call, during which Temple instructed everyone to "[m]ake sure to follow the [document] policy." Brief for United States 7 (brackets in original). On October 23, Enron CEO Lay declined to answer questions during a call with analysts because of "potential lawsuits, as well as the SEC inquiry." *Ibid.* After the call, Duncan met with other Andersen partners on the Enron engagement team and told them that they should ensure team members were complying with the document policy. Another meeting for all team members followed, during which Duncan distributed the policy and told everyone to comply. These, and other smaller meetings, were followed by substantial destruction of paper and electronic documents.

On October 26, one of petitioner's senior partners circulated a New York Times article discussing the SEC's response to Enron. His e-mail commented that "the problems are just beginning and we will be in the cross hairs. The marketplace is going to keep the pressure on this and is going to force the SEC to be tough." *Id.*, at 8. On October 30, the SEC opened a formal investigation and sent Enron a letter that requested accounting documents.

Throughout this time period, the document destruction continued, despite reservations by some of petitioner's managers.[6] On November 8, Enron announced that it would

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[6] For example, on October 26, John Riley, another partner with petitioner, saw Duncan shredding documents and told him "this wouldn't be the best time in the world for you guys to be shredding a bunch of stuff." Brief for United States 9. On October 31, David Stulb, a forensics investigator for petitioner, met with Duncan. During the meeting, Duncan picked up a document with the words "smoking gun" written on it and began to destroy it, adding "we don't need this." *Ibid.* Stulb cautioned Duncan on the need to maintain documents and later informed Temple that Duncan needed advice on the document retention policy.

issue a comprehensive restatement of its earnings and assets. Also on November 8, the SEC served Enron and petitioner with subpoenas for records. On November 9, Duncan's secretary sent an e-mail that stated: "Per Dave—No more shredding. . . . We have been officially served for our documents." *Id.*, at 10. Enron filed for bankruptcy less than a month later. Duncan was fired and later pleaded guilty to witness tampering.

In March 2002, petitioner was indicted in the Southern District of Texas on one count of violating §§ 1512(b)(2)(A) and (B). The indictment alleged that, between October 10 and November 9, 2001, petitioner "did knowingly, intentionally and corruptly persuade . . . other persons, to wit: [petitioner's] employees, with intent to cause" them to withhold documents from, and alter documents for use in, "official proceedings, namely: regulatory and criminal proceedings and investigations." App. JA–139. A jury trial followed. When the case went to the jury, that body deliberated for seven days and then declared that it was deadlocked. The District Court delivered an "*Allen* charge," *Allen* v. *United States*, 164 U. S. 492 (1896), and, after three more days of deliberation, the jury returned a guilty verdict. The District Court denied petitioner's motion for a judgment of acquittal.

The Court of Appeals for the Fifth Circuit affirmed. 374 F. 3d, at 284. It held that the jury instructions properly conveyed the meaning of "corruptly persuades" and "official proceeding"; that the jury need not find any consciousness of wrongdoing; and that there was no reversible error. Because of a split of authority regarding the meaning of § 1512(b), we granted certiorari.[7] 543 U. S. 1042 (2005).

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[7] Compare, *e. g.*, *United States* v. *Shotts*, 145 F. 3d 1289, 1301 (CA11 1998), with *United States* v. *Farrell*, 126 F. 3d 484, 489–490 (CA3 1997).

Chapter 73 of Title 18 of the United States Code provides criminal sanctions for those who obstruct justice. Sections 1512(b)(2)(A) and (B), part of the witness tampering provisions, provide in relevant part:

> "Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to . . . cause or induce any person to . . . withhold testimony, or withhold a record, document, or other object, from an official proceeding [or] alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding . . . shall be fined under this title or imprisoned not more than ten years, or both."

In this case, our attention is focused on what it means to "knowingly . . . corruptly persuad[e]" another person "with intent to . . . cause" that person to "withhold" documents from, or "alter" documents for use in, an "official proceeding."

"We have traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, *Dowling* v. *United States*, 473 U. S. 207 (1985), and out of concern that 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed,' *McBoyle* v. *United States*, 283 U. S. 25, 27 (1931)." *United States* v. *Aguilar*, 515 U. S. 593, 600 (1995).

Such restraint is particularly appropriate here, where the act underlying the conviction—"persua[sion]"—is by itself innocuous. Indeed, "persuad[ing]" a person "with intent to . . . cause" that person to "withhold" testimony or documents from a Government proceeding or Government official

is not inherently malign.[8] Consider, for instance, a mother who suggests to her son that he invoke his right against compelled self-incrimination, see U. S. Const., Amdt. 5, or a wife who persuades her husband not to disclose marital confidences, see *Trammel* v. *United States*, 445 U. S. 40 (1980).

Nor is it necessarily corrupt for an attorney to "persuad[e]" a client "with intent to . . . cause" that client to "withhold" documents from the Government. In *Upjohn Co.* v. *United States*, 449 U. S. 383 (1981), for example, we held that Upjohn was justified in withholding documents that were covered by the attorney-client privilege from the Internal Revenue Service (IRS). See *id.*, at 395. No one would suggest that an attorney who "persuade[d]" Upjohn to take that step acted wrongfully, even though he surely intended that his client keep those documents out of the IRS' hands.

"Document retention policies," which are created in part to keep certain information from getting into the hands of others, including the Government, are common in business. See generally Chase, To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes, 8 Ford. J. Corp. & Fin. L. 721 (2003). It is, of course, not wrongful for a manager to instruct his employees to comply with a valid document retention policy under ordinary circumstances.

Acknowledging this point, the parties have largely focused their attention on the word "corruptly" as the key to what may or may not lawfully be done in the situation presented here. Section 1512(b) punishes not just "corruptly persuad[ing]" another, but "*knowingly* . . . corruptly persuad[ing]" another. (Emphasis added.) The Government suggests that "knowingly" does not modify "corruptly per-

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[8] Section 1512(b)(2) addresses testimony, as well as documents. Section 1512(b)(1) also addresses testimony. Section 1512(b)(3) addresses "persuade[rs]" who intend to prevent "the communication to a law enforcement officer or judge of the United States of information" relating to a federal crime.

suades," but that is not how the statute most naturally reads. It provides the *mens rea*—"knowingly"—and then a list of acts—"uses intimidation or physical force, threatens, or corruptly persuades." We have recognized with regard to similar statutory language that the *mens rea* at least applies to the acts that immediately follow, if not to *other* elements down the statutory chain. See *United States* v. *X-Citement Video, Inc.*, 513 U. S. 64, 68 (1994) (recognizing that the "most natural grammatical reading" of 18 U. S. C. §§ 2252(a)(1) and (2) "suggests that the term 'knowingly' modifies only the surrounding verbs: transports, ships, receives, distributes, or reproduces"); see also *Liparota* v. *United States*, 471 U. S. 419 (1985). The Government suggests that it is "questionable whether Congress would employ such an inelegant formulation as 'knowingly . . . corruptly persuades.'" Brief for United States 35, n. 18. Long experience has not taught us to share the Government's doubts on this score, and we must simply interpret the statute as written.

The parties have not pointed us to another interpretation of "knowingly . . . corruptly" to guide us here.[9] In any event, the natural meaning of these terms provides a clear answer. See *Bailey* v. *United States*, 516 U. S. 137, 144–145 (1995). "[K]nowledge" and "knowingly" are normally associated with awareness, understanding, or consciousness. See Black's Law Dictionary 888 (8th ed. 2004) (hereinafter Black's); Webster's Third New International Dictionary 1252–1253 (1993) (hereinafter Webster's 3d); American Heritage Dictionary of the English Language 725 (1981) (hereinafter Am. Hert.). "Corrupt" and "corruptly" are normally associated with wrongful, immoral, depraved, or evil. See Black's 371; Webster's 3d 512; Am. Hert. 299–300. Joining these meanings together here makes sense both linguisti-

[9] The parties have pointed us to two other obstruction provisions, 18 U. S. C. §§ 1503 and 1505, which contain the word "corruptly." But these provisions lack the modifier "knowingly," making any analogy inexact.

cally and in the statutory scheme. Only persons conscious of wrongdoing can be said to "knowingly . . . corruptly persuad[e]." And limiting criminality to persuaders conscious of their wrongdoing sensibly allows § 1512(b) to reach only those with the level of "culpability . . . we usually require in order to impose criminal liability." *United States* v. *Aguilar*, 515 U. S., at 602; see also *Liparota* v. *United States*, *supra*, at 426.

The outer limits of this element need not be explored here because the jury instructions at issue simply failed to convey the requisite consciousness of wrongdoing. Indeed, it is striking how little culpability the instructions required. For example, the jury was told that, "even if [petitioner] honestly and sincerely believed that its conduct was lawful, you may find [petitioner] guilty." App. JA–213. The instructions also diluted the meaning of "corruptly" so that it covered innocent conduct. *Id.*, at JA–212.

The parties vigorously disputed how the jury would be instructed on "corruptly." The District Court based its instruction on the definition of that term found in the Fifth Circuit Pattern Jury Instruction for § 1503. This pattern instruction defined "corruptly" as " 'knowingly and dishonestly, with the specific intent to subvert or undermine the integrity' " of a proceeding. Brief for Petitioner 3, n. 3 (emphasis deleted). The Government, however, insisted on excluding "dishonestly" and adding the term "impede" to the phrase "subvert or undermine." *Ibid.* (internal quotation marks omitted). The District Court agreed over petitioner's objections, and the jury was told to convict if it found petitioner intended to "subvert, undermine, or impede" governmental factfinding by suggesting to its employees that they enforce the document retention policy. App. JA–212.

These changes were significant. No longer was any type of "dishonest[y]" necessary to a finding of guilt, and it was enough for petitioner to have simply "impede[d]" the Government's factfinding ability. As the Government conceded

at oral argument, "'[i]mpede'" has broader connotations than "'subvert'" or even "'[u]ndermine,'" see Tr. of Oral Arg. 38, and many of these connotations do not incorporate any "corrupt[ness]" at all. The dictionary defines "impede" as "to interfere with or get in the way of the progress of" or "hold up" or "detract from." Webster's 3d 1132. By definition, anyone who innocently persuades another to withhold information from the Government "get[s] in the way of the progress of" the Government. With regard to such innocent conduct, the "corruptly" instructions did no limiting work whatsoever.

The instructions also were infirm for another reason. They led the jury to believe that it did not have to find *any* nexus between the "persua[sion]" to destroy documents and any particular proceeding.[10] In resisting any type of nexus element, the Government relies heavily on § 1512(e)(1), which states that an official proceeding "need not be pending or about to be instituted at the time of the offense." It is, however, one thing to say that a proceeding "need not be pending or about to be instituted at the time of the offense," and

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[10] We disagree with the Government's suggestion that petitioner's "nexus" argument is not preserved or that it is only subject to plain-error review for failure to comply with Federal Rule of Criminal Procedure 30(d). Petitioner plainly argued for, and objected to the instructions' lack of, a nexus requirement. See, *e. g.*, Record 425 (arguing for a "nexus" and explaining that "it is insufficient for the government to show that the defendant intended to affect some hypothetical future federal proceeding"); *id.*, at 931–932, 938; Tr. 4339–4345 (May 25, 2002). In so doing, it reasonably relied on language in *United States* v. *Shively*, 927 F. 2d 804, 812–813 (CA5 1991). Although the instruction petitioner proposed, based on *Shively*, does not mirror the nexus requirement it now proposes, its actions were sufficient to satisfy Rule 30(d). This argument also was preserved in the Court of Appeals, which recognized that petitioner was challenging "the concreteness of the defendant's expectation[s] of a proceeding." 374 F. 3d 281, 298 (CA5 2004); see *United States* v. *Williams*, 504 U. S. 36, 41–42 (1992). However, the Court of Appeals did not address, and petitioner did not preserve, its argument that informal inquiries are not covered by the statute. See *ibid.*

quite another to say a proceeding need not even be foreseen. A "knowingly . . . corrup[t] persaude[r]" cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material.

We faced a similar situation in *Aguilar, supra.* Respondent Aguilar lied to a Federal Bureau of Investigation agent in the course of an investigation and was convicted of "'corruptly endeavor[ing] to influence, obstruct, and impede [a] . . . grand jury investigation'" under § 1503. 515 U. S., at 599. All the Government had shown was that Aguilar had uttered false statements to an investigating agent "who might or might not testify before a grand jury." *Id.*, at 600. We held that § 1503 required something more—specifically, a "nexus" between the obstructive act and the proceeding. *Id.*, at 599–600. "[I]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding," we explained, "he lacks the requisite intent to obstruct." *Id.*, at 599.

For these reasons, the jury instructions here were flawed in important respects. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

Syllabus

# CUTTER ET AL. *v.* WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL.

## CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 03–9877. Argued March 21, 2005—Decided May 31, 2005

Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA or Act), 42 U. S. C. § 2000cc–1(a)(1)–(2), provides in part: "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers "a compelling governmental interest," and does so by "the least restrictive means." Petitioners, current and former inmates of Ohio state institutions, allege, *inter alia*, that respondent prison officials violated § 3 by failing to accommodate petitioners' exercise of their "nonmainstream" religions in a variety of ways. Respondents moved to dismiss that claim, arguing, among other things, that § 3, on its face, improperly advances religion in violation of the First Amendment's Establishment Clause. Rejecting that argument, the District Court stated that RLUIPA permits safety and security—undisputedly compelling state interests—to outweigh an inmate's claim to a religious accommodation. On the thin record before it, the court could not find that enforcement of RLUIPA, inevitably, would compromise prison security. Reversing on interlocutory appeal, the Sixth Circuit held that § 3 impermissibly advances religion by giving greater protection to religious rights than to other constitutionally protected rights, and suggested that affording religious prisoners superior rights might encourage prisoners to become religious.

*Held:* Section 3 of RLUIPA, on its face, qualifies as a permissible accommodation that is not barred by the Establishment Clause. Pp. 719–726.

(a) Foremost, § 3 is compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise. See, *e. g.*, *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet*, 512 U. S. 687, 705. Furthermore, the Act on its face does not founder on shoals the Court's prior decisions have identified: Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries, see *Estate of Thornton* v. *Caldor, Inc.*, 472 U. S. 703; and they must be satisfied that the Act's prescriptions are and will be administered neutrally among different faiths, see *Kiryas Joel*, 512 U. S. 687. "[T]he

'exercise of religion' often involves not only belief and profession but the performance of . . . physical acts [such as] assembling with others for a worship service [or] participating in sacramental use of bread and wine . . . ." *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 877. Section 3 covers state-run institutions—mental hospitals, prisons, and the like—in which the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise. 42 U. S. C. § 2000cc–1(a); § 1997. RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion. But the Act does not elevate accommodation of religious observances over an institution's need to maintain order and safety. An accommodation must be measured so that it does not override other significant interests. See *Caldor*, 472 U. S., at 709–710. There is no reason to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to security concerns. While the Act adopts a "compelling interest" standard, § 2000cc–1(a), "[c]ontext matters" in the application of that standard, see *Grutter* v. *Bollinger*, 539 U. S. 306, 327. Lawmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions and anticipated that courts would apply the Act's standard with due deference to prison administrators' experience and expertise. Finally, RLUIPA does not differentiate among bona fide faiths. It confers no privileged status on any particular religious sect. Cf. *Kiryas Joel*, 512 U. S., at 706. Pp. 719–724.

(b) The Sixth Circuit misread this Court's precedents to require invalidation of RLUIPA as impermissibly advancing religion by giving greater protection to religious rights than to other constitutionally protected rights. *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327, counsels otherwise. There, in upholding against an Establishment Clause challenge a provision exempting religious organizations from the prohibition against religion-based employment discrimination in Title VII of the Civil Rights Act of 1964, the Court held that religious accommodations need not "come packaged with benefits to secular entities." *Id.*, at 338. Were the Court of Appeals' view correct, all manner of religious accommodations would fall. For example, Ohio could not, as it now does, accommodate traditionally recognized religions by providing chaplains and allowing worship services. In upholding § 3, the Court emphasizes that respondents have raised a facial challenge and have not contended that applying RLUIPA would produce unconstitutional results in any specific case. There is no reason to anticipate that abusive prisoner

Syllabus

litigation will overburden state and local institutions. However, should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize an institution's effective functioning, the facility would be free to resist the imposition. In that event, adjudication in as-applied challenges would be in order. Pp. 724–726.

349 F. 3d 257, reversed and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court. THOMAS, J., filed a concurring opinion, *post*, p. 726.

*David Goldberger* argued the cause for petitioners. With him on the briefs were *Marc D. Stern* and *Benson A. Wolman.*

*Acting Solicitor General Clement* argued the cause for the United States as respondent under this Court's Rule 12.6 in support of petitioners. With him on the briefs were *Assistant Attorney General Keisler, Patricia A. Millett, Mark B. Stern,* and *Michael S. Raab.*

*Douglas R. Cole,* State Solicitor of Ohio, argued the cause for respondents. With him on the brief were *Jim Petro,* Attorney General, *Stephen P. Carney,* Senior Deputy Solicitor, and *Todd R. Marti* and *Franklin E. Crawford,* Assistant Solicitors.*

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*Briefs of *amici curiae* urging reversal were filed for the State of New York et al. by *Eliot Spitzer,* Attorney General of New York, *Caitlin J. Halligan,* Solicitor General, *Daniel Smirlock,* Deputy Solicitor General, and *Jean Lin* and *Benjamin N. Gutman,* Assistant Solicitors General, and by *Christine O. Gregoire,* Attorney General of Washington; for the American Correctional Chaplains Association et al. by *Gene C. Schaerr;* for Americans United for Separation of Church and State et al. by *David M. Gossett, David C. Fathi, Ayesha N. Khan, Richard B. Katskee, Alex J. Luchenitser,* and *Steven R. Shapiro;* for the National Association of Evangelicals et al. by *Douglas Laycock* and *Nathan J. Diament;* and for Sen. Orrin G. Hatch et al. by *Martin S. Lederman.*

Briefs of *amici curiae* urging affirmance were filed for the Commonwealth of Virginia et al. by *Judith Williams Jagdmann,* Attorney General of Virginia, *William E. Thro,* State Solicitor General, *Maureen Riley Matsen,* Deputy Attorney General, and *Matthew M. Cobb, Carla R. Collins, Eric A. Gregory, Joel C. Hoppe, Courtney M. Malveaux, Valerie L. Myers,*

JUSTICE GINSBURG delivered the opinion of the Court.

Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA or Act), 114 Stat. 804, 42 U. S. C. §2000cc–1(a)(1)–(2), provides in part: "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers "a compelling governmental interest," and does so by "the least restrictive means." Plaintiffs below, petitioners here, are current and former inmates of institutions operated by the Ohio Department of Rehabilitation and Correction and assert that they are adherents of "nonmainstream" religions: the Satanist, Wicca, and Asatru religions, and the Church of Jesus Christ Christian.[1] They complain that Ohio prison officials (respondents here), in violation of RLUIPA, have failed to accommodate their religious exercise

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*A. Cameron O'Brion, Ronald N. Regnery, D. Mathias Roussy, Jr.*, and *William R. Sievers*, Associate State Solicitors General, by *Alva A. Swan*, Acting Attorney General of the Virgin Islands, and by the Attorneys General for their respective States as follows: *Gregg D. Renkes* of Alaska, *Lawrence G. Wasden* of Idaho, *Thomas J. Miller* of Iowa, *Jon Bruning* of Nebraska, *Wayne Stenehjem* of North Dakota, *W. A. Drew Edmondson* of Oklahoma, and *Darrell V. McGraw, Jr.*, of West Virginia; for the American Jail Association et al. by *Michael N. Beekhuizen* and *Michael H. Carpenter;* and for the Claremont Institute Center for Constitutional Jurisprudence by *John C. Eastman* and *Edwin Meese III.*

Briefs of *amici curiae* were filed for the Coalition for the Free Exercise of Religion by *Anthony R. Picarello, Jr.*, and *K. Hollyn Hollman;* for the International Municipal Lawyers Association et al. by *Marci A. Hamilton;* and for the Rutherford Institute by *James J. Knicely* and *John W. Whitehead.*

[1] Petitioners Cutter and Gerhardt are no longer in the custody of the Ohio Department of Rehabilitation and Correction. Brief for Petitioners 2, n. 1. No party has suggested that this case has become moot, nor has it: Without doubt, a live controversy remains among the still-incarcerated petitioners, the United States, and respondents. We do not reach the question whether the claims of Cutter and Gerhardt continue to present an actual controversy. See *Steffel* v. *Thompson*, 415 U. S. 452, 459–460, and n. 10 (1974).

> "in a variety of different ways, including retaliating and discriminating against them for exercising their nontraditional faiths, denying them access to religious literature, denying them the same opportunities for group worship that are granted to adherents of mainstream religions, forbidding them to adhere to the dress and appearance mandates of their religions, withholding religious ceremonial items that are substantially identical to those that the adherents of mainstream religions are permitted, and failing to provide a chaplain trained in their faith." Brief for United States 5.

For purposes of this litigation at its current stage, respondents have stipulated that petitioners are members of bona fide religions and that they are sincere in their beliefs. *Gerhardt* v. *Lazaroff*, 221 F. Supp. 2d 827, 833 (SD Ohio 2002).

In response to petitioners' complaints, respondent prison officials have mounted a facial challenge to the institutionalized-persons provision of RLUIPA; respondents contend, *inter alia*, that the Act improperly advances religion in violation of the First Amendment's Establishment Clause. The District Court denied respondents' motion to dismiss petitioners' complaints, but the Court of Appeals reversed that determination. The appeals court held, as the prison officials urged, that the portion of RLUIPA applicable to institutionalized persons, 42 U. S. C. § 2000cc–1, violates the Establishment Clause. We reverse the Court of Appeals' judgment.

"This Court has long recognized that the government may . . . accommodate religious practices . . . without violating the Establishment Clause." *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136, 144–145 (1987). Just last Term, in *Locke* v. *Davey*, 540 U. S. 712 (2004), the Court reaffirmed that "there is room for play in the joints between" the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause.

*Id.*, at 718 (quoting *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664, 669 (1970)). "At some point, accommodation may devolve into 'an unlawful fostering of religion.'" *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U. S. 327, 334–335 (1987) (quoting *Hobbie*, 480 U. S., at 145). But § 3 of RLUIPA, we hold, does not, on its face, exceed the limits of permissible government accommodation of religious practices.

## I

### A

RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with this Court's precedents. Ten years before RLUIPA's enactment, the Court held, in *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 878–882 (1990), that the First Amendment's Free Exercise Clause does not inhibit enforcement of otherwise valid laws of general application that incidentally burden religious conduct. In particular, we ruled that the Free Exercise Clause did not bar Oregon from enforcing its blanket ban on peyote possession with no allowance for sacramental use of the drug. Accordingly, the State could deny unemployment benefits to persons dismissed from their jobs because of their religiously inspired peyote use. *Id.*, at 874, 890. The Court recognized, however, that the political branches could shield religious exercise through legislative accommodation, for example, by making an exception to proscriptive drug laws for sacramental peyote use. *Id.*, at 890.

Responding to *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U. S. C. § 2000bb *et seq.* RFRA "prohibits '[g]overnment' from 'substantially burden[ing]' a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden '(1)

is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" *City of Boerne* v. *Flores*, 521 U. S. 507, 515–516 (1997) (quoting § 2000bb–1; brackets in original). "[U]niversal" in its coverage, RFRA "applie[d] to all Federal and State law," *id.*, at 516 (quoting former § 2000bb–3(a)), but notably lacked a Commerce Clause underpinning or a Spending Clause limitation to recipients of federal funds. In *City of Boerne*, this Court invalidated RFRA as applied to States and their subdivisions, holding that the Act exceeded Congress' remedial powers under the Fourteenth Amendment. *Id.*, at 532–536.[2]

Congress again responded, this time by enacting RLUIPA. Less sweeping than RFRA, and invoking federal authority under the Spending and Commerce Clauses, RLUIPA targets two areas: Section 2 of the Act concerns land-use regulation, 42 U. S. C. § 2000cc;[3] § 3 relates to religious exercise by institutionalized persons, § 2000cc–1. Section 3, at issue here, provides that "[n]o [state or local] government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the government shows that the burden furthers "a compelling governmental interest" and does so by "the least restrictive means." § 2000cc–1(a)(1)–(2). The Act defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." § 2000cc–5(7)(A). Section 3 applies when "the substantial burden [on religious exercise] is imposed in a program or

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[2] RFRA, Courts of Appeals have held, remains operative as to the Federal Government and federal territories and possessions. See *O'Bryan* v. *Bureau of Prisons*, 349 F. 3d 399, 400–401 (CA7 2003); *Guam* v. *Guerrero*, 290 F. 3d 1210, 1220–1222 (CA9 2002); *Kikumura* v. *Hurley*, 242 F. 3d 950, 958–960 (CA10 2001); *In re Young*, 141 F. 3d 854, 858–863 (CA8 1998). This Court, however, has not had occasion to rule on the matter.

[3] Section 2 of RLUIPA is not at issue here. We therefore express no view on the validity of that part of the Act.

activity that receives Federal financial assistance,"[4] or "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes." § 2000cc–1(b)(1)–(2). "A person may assert a violation of [RLUIPA] as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." § 2000cc–2(a).

Before enacting § 3, Congress documented, in hearings spanning three years, that "frivolous or arbitrary" barriers impeded institutionalized persons' religious exercise. See 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) (hereinafter Joint Statement) ("Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways.").[5] To se-

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[4] Every State, including Ohio, accepts federal funding for its prisons. Brief for United States 28, n. 16 (citing FY 2003 Office of Justice Programs & Office of Community Oriented Policing Services Grants by State).

[5] The hearings held by Congress revealed, for a typical example, that "[a] state prison in Ohio refused to provide Moslems with Hallal food, even though it provided Kosher food." Hearing on Protecting Religious Freedom After *Boerne* v. *Flores* before the Subcommittee on the Constitution of the House Committee on the Judiciary, 105th Cong., 2d Sess., pt. 3, p. 11, n. 1 (1998) (hereinafter Protecting Religious Freedom) (prepared statement of Marc D. Stern, Legal Director, American Jewish Congress). Across the country, Jewish inmates complained that prison officials refused to provide sack lunches, which would enable inmates to break their fasts after nightfall. *Id.*, at 39 (statement of Isaac M. Jaroslawicz, Director of Legal Affairs for the Aleph Institute). The "Michigan Department of Corrections . . . prohibit[ed] the lighting of Chanukah candles at all state prisons" even though "smoking" and "votive candles" were permitted. *Id.*, at 41 (same). A priest responsible for communications between Roman Catholic dioceses and corrections facilities in Oklahoma stated that there "was [a] nearly yearly battle over the Catholic use of Sacramental Wine . . . for the celebration of the Mass," and that prisoners' religious possessions, "such as the Bible, the Koran, the Talmud or items needed by Native Americans[,] . . . were frequently treated with contempt and were confiscated, damaged or discarded" by prison officials. *Id.*, pt. 2, at 58–59 (prepared statement of Donald W. Brooks, Reverend, Diocese of Tulsa, Oklahoma).

cure redress for inmates who encountered undue barriers to their religious observances, Congress carried over from RFRA the "compelling governmental interest"/"least restrictive means" standard. See *id.*, at 16698. Lawmakers anticipated, however, that courts entertaining complaints under § 3 would accord "due deference to the experience and expertise of prison and jail administrators." *Id.*, at 16699 (quoting S. Rep. No. 103–111, p. 10 (1993)).

B

Petitioners initially filed suit against respondents asserting claims under the First and Fourteenth Amendments. After RLUIPA's enactment, petitioners amended their complaints to include claims under § 3. Respondents moved to dismiss the statutory claims, arguing, *inter alia*, that § 3 violates the Establishment Clause. 221 F. Supp. 2d, at 846. Pursuant to 28 U. S. C. § 2403(a), the United States intervened in the District Court to defend RLUIPA's constitutionality. 349 F. 3d 257, 261 (CA6 2003).

Adopting the report and recommendation of the Magistrate Judge, the District Court rejected the argument that § 3 conflicts with the Establishment Clause. 221 F. Supp. 2d, at 846–848. As to the Act's impact on a prison's staff and general inmate population, the court stated that RLUIPA "permits safety and security—which are undisputedly compelling state interests—to outweigh an inmate's claim to a religious accommodation." *Id.*, at 848. On the thin record before it, the court declined to find, as respondents had urged, that enforcement of RLUIPA, inevitably, would compromise prison security. *Ibid.*

On interlocutory appeal pursuant to 28 U. S. C. § 1292(b), the Court of Appeals for the Sixth Circuit reversed. Citing *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971),[6] the Court of Ap-

[6] *Lemon* stated a three-part test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not

peals held that § 3 of RLUIPA "impermissibly advanc[es] religion by giving greater protection to religious rights than to other constitutionally protected rights." 349 F. 3d, at 264. Affording "religious prisoners rights superior to those of nonreligious prisoners," the court suggested, might "encourag[e] prisoners to become religious in order to enjoy greater rights." *Id.*, at 266.

We granted certiorari to resolve the conflict among Courts of Appeals on the question whether RLUIPA's institutionalized-persons provision, § 3 of the Act, is consistent with the Establishment Clause of the First Amendment. 543 U. S. 924 (2004).[7] Compare 349 F. 3d 257 with *Madison* v. *Riter*, 355 F. 3d 310, 313 (CA4 2003) (§ 3 of RLUIPA does not violate the Establishment Clause); *Charles* v. *Verhagen*, 348 F. 3d 601, 610–611 (CA7 2003) (same); *Mayweathers* v. *Newland*, 314 F. 3d 1062, 1068–1069 (CA9 2002) (same). We

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foster an excessive government entanglement with religion." 403 U. S., at 612–613 (citations and internal quotation marks omitted). We resolve this case on other grounds.

[7] Respondents argued below that RLUIPA exceeds Congress' legislative powers under the Spending and Commerce Clauses and violates the Tenth Amendment. The District Court rejected respondents' challenges under the Spending Clause, *Gerhardt* v. *Lazaroff*, 221 F. Supp. 2d 827, 839–849 (SD Ohio 2002), and the Tenth Amendment, *id.*, at 850–851, and declined to reach the Commerce Clause question, *id.*, at 838–839. The Sixth Circuit, having determined that RLUIPA violates the Establishment Clause, did not rule on respondents' further arguments. See 349 F. 3d 257, 259–260, 269 (2003). Respondents renew those arguments in this Court. They also augment their federalism-based or residual-powers contentions by asserting that, in the space between the Free Exercise and Establishment Clauses, the States' choices are not subject to congressional oversight. See Brief for Respondents 9, 25–33; cf. *Madison* v. *Riter*, 355 F. 3d 310, 322 (CA4 2003). Because these defensive pleas were not addressed by the Court of Appeals, and mindful that we are a court of review, not of first view, we do not consider them here. See *F. Hoffmann-La Roche Ltd* v. *Empagran S. A.*, 542 U. S. 155, 175 (2004); *United States* v. *Oakland Cannabis Buyers' Cooperative*, 532 U. S. 483, 494 (2001). But cf. *post*, at 727, n. 2 (THOMAS, J., concurring).

now reverse the judgment of the Court of Appeals for the Sixth Circuit.

## II

### A

The Religion Clauses of the First Amendment provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The first of the two Clauses, commonly called the Establishment Clause, commands a separation of church and state. The second, the Free Exercise Clause, requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people. While the two Clauses express complementary values, they often exert conflicting pressures. See *Locke*, 540 U. S., at 718 ("These two Clauses . . . are frequently in tension."); *Walz*, 397 U. S., at 668–669 ("The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.").

Our decisions recognize that "there is room for play in the joints" between the Clauses, *id.*, at 669, some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause. See, *e. g.*, *Smith*, 494 U. S., at 890 ("[A] society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation . . . ."); *Amos*, 483 U. S., at 329–330 (Federal Government may exempt secular nonprofit activities of religious organizations from Title VII's prohibition on religious discrimination in employment); *Sherbert* v. *Verner*, 374 U. S. 398, 422 (1963) (Harlan, J., dissenting) ("The constitutional obligation of 'neutrality' is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation." (citation omitted)). In accord with the majority of Courts of Appeals that have ruled on the question, see *supra*, at 718 and this

page, we hold that §3 of RLUIPA fits within the corridor between the Religion Clauses: On its face, the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause.

Foremost, we find RLUIPA's institutionalized-persons provision compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise. See *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet*, 512 U. S. 687, 705 (1994) (government need not "be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice"); *Amos*, 483 U. S., at 349 (O'CONNOR, J., concurring in judgment) (removal of government-imposed burdens on religious exercise is more likely to be perceived "as an accommodation of the exercise of religion rather than as a Government endorsement of religion"). Furthermore, the Act on its face does not founder on shoals our prior decisions have identified: Properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries, see *Estate of Thornton* v. *Caldor, Inc.*, 472 U. S. 703 (1985); and they must be satisfied that the Act's prescriptions are and will be administered neutrally among different faiths, see *Kiryas Joel*, 512 U. S. 687.[8]

"[T]he 'exercise of religion' often involves not only belief and profession but the performance of . . . physical acts [such as] assembling with others for a worship service [or] participating in sacramental use of bread and wine . . . ." *Smith*, 494 U. S., at 877. Section 3 covers state-run institutions—mental hospitals, prisons, and the like—in which the government exerts a degree of control unparalleled in civilian soci-

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[8] Directed at obstructions institutional arrangements place on religious observances, RLUIPA does not require a State to pay for an inmate's devotional accessories. See, *e. g.*, *Charles* v. *Verhagen*, 348 F. 3d 601, 605 (CA7 2003) (overturning prohibition on possession of Islamic prayer oil but leaving inmate-plaintiff with responsibility for purchasing the oil).

ety and severely disabling to private religious exercise. 42 U. S. C. § 2000cc–1(a); § 1997; see Joint Statement 16699 ("Institutional residents' right to practice their faith is at the mercy of those running the institution.").[9] RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion.[10]

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[9] See, *e. g.*, *ibid.* (prison's regulation prohibited Muslim prisoner from possessing ritual cleansing oil); *Young* v. *Lane*, 922 F. 2d 370, 375–376 (CA7 1991) (prison's regulation restricted wearing of yarmulkes); *Hunafa* v. *Murphy*, 907 F. 2d 46, 47–48 (CA7 1990) (noting instances in which Jewish and Muslim prisoners were served pork, with no substitute available).

[10] Respondents argue, in line with the Sixth Circuit, that RLUIPA goes beyond permissible reduction of impediments to free exercise. The Act, they project, advances religion by encouraging prisoners to "get religion," and thereby gain accommodations afforded under RLUIPA. Brief for Respondents 15–17; see 349 F. 3d, at 266 ("One effect of RLUIPA is to induce prisoners to adopt or feign religious belief in order to receive the statute's benefits."). While some accommodations of religious observance, notably the opportunity to assemble in worship services, might attract joiners seeking a break in their closely guarded day, we doubt that all accommodations would be perceived as "benefits." For example, congressional hearings on RLUIPA revealed that one state corrections system served as its kosher diet "a fruit, a vegetable, a granola bar, and a liquid nutritional supplement—each and every meal." Protecting Religious Freedom, pt. 3, at 38 (statement of Jaroslawicz).

The argument, in any event, founders on the fact that Ohio already facilitates religious services for mainstream faiths. The State provides chaplains, allows inmates to possess religious items, and permits assembly for worship. See App. 199 (affidavit of David Schwarz, Religious Services Administrator for the South Region of the Ohio Dept. of Rehabilitation and Correction (Oct. 19, 2000)) (job duties include "facilitating the delivery of religious services in 14 correctional institutions of various security levels throughout . . . Ohio"); Ohio Dept. of Rehabilitation and Correction, Table of Organization (Apr. 2005), available at http://www.drc.state.oh.us/web/DRCORG1.pdf (as visited May 27, 2005, and available in Clerk of Court's case file) (department includes "Religious Services" division); Brief for United States 20, and n. 8 (citing, *inter alia*, *Gawloski* v. *Dallman*, 803 F. Supp. 103, 113 (SD Ohio 1992) (inmate in protective custody allowed to

We note in this regard the Federal Government's accommodation of religious practice by members of the military. See, *e. g.*, 10 U. S. C. § 3073 (referring to Army chaplains); *Katcoff* v. *Marsh*, 755 F. 2d 223, 225–229 (CA2 1985) (describing the Army chaplaincy program). In *Goldman* v. *Weinberger*, 475 U. S. 503 (1986), we held that the Free Exercise Clause did not require the Air Force to exempt an Orthodox Jewish officer from uniform dress regulations so that he could wear a yarmulke indoors. In a military community, the Court observed, "there is simply not the same [individual] autonomy as there is in the larger civilian community." *Id.*, at 507 (brackets in original; internal quotation marks omitted). Congress responded to *Goldman* by prescribing that "a member of the armed forces may wear an item of religious apparel while wearing the uniform," unless "the wearing of the item would interfere with the performance [of] military duties [or] the item of apparel is not neat and conservative." 10 U. S. C. § 774(a)–(b).

We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override other significant interests. In *Caldor*, the Court struck down a Connecticut law that "arm[ed] Sabbath observers with an absolute and unqualified right not to work on whatever day they designate[d] as their Sabbath." 472 U. S., at 709. We held the law invalid under the Establishment Clause because it "unyielding[ly] weigh[ted]" the interests of Sabbatarians "over all other interests." *Id.*, at 710.

We have no cause to believe that RLUIPA would not be applied in an appropriately balanced way, with particular sensitivity to security concerns. While the Act adopts a

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attend a congregational religious service, possess a Bible and other religious materials, and receive chaplain visits); *Taylor* v. *Perini*, 413 F. Supp. 189, 238 (ND Ohio 1976) (institutional chaplains had free access to correctional area)).

"compelling governmental interest" standard, see *supra*, at 715, "[c]ontext matters" in the application of that standard. See *Grutter* v. *Bollinger*, 539 U. S. 306, 327 (2003).[11] Lawmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions. See, *e. g.*, 139 Cong. Rec. 26190 (1993) (remarks of Sen. Hatch). They anticipated that courts would apply the Act's standard with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." Joint Statement 16699 (quoting S. Rep. No. 103–111, at 10).[12]

Finally, RLUIPA does not differentiate among bona fide faiths. In *Kiryas Joel*, we invalidated a state law that carved out a separate school district to serve exclusively a

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[11] The Sixth Circuit posited that an irreligious prisoner and member of the Aryan Nation who challenges prison officials' confiscation of his white supremacist literature as a violation of his free association and expression rights would have his claims evaluated under the deferential rational-relationship standard described in *Turner* v. *Safley*, 482 U. S. 78 (1987). A member of the Church of Jesus Christ Christian challenging a similar withholding, the Sixth Circuit assumed, would have a stronger prospect of success because a court would review his claim under RLUIPA's compelling-interest standard. 349 F. 3d, at 266 (citing *Madison* v. *Riter*, 240 F. Supp. 2d 566, 576 (WD Va. 2003)). Courts, however, may be expected to recognize the government's countervailing compelling interest in not facilitating inflammatory racist activity that could imperil prison security and order. Cf. *Reimann* v. *Murphy*, 897 F. Supp. 398, 402–403 (ED Wis. 1995) (concluding, under RFRA, that excluding racist literature advocating violence was the least restrictive means of furthering the compelling state interest in preventing prison violence); *George* v. *Sullivan*, 896 F. Supp. 895, 898 (WD Wis. 1995) (same).

[12] State prison officials make the first judgment about whether to provide a particular accommodation, for a prisoner may not sue under RLUIPA without first exhausting all available administrative remedies. See 42 U. S. C. §2000cc–2(e) (nothing in RLUIPA "shall be construed to amend or repeal the Prison Litigation Reform Act of 1995"); §1997e(a) (requiring exhaustion of administrative remedies).

community of highly religious Jews, the Satmar Hasidim. We held that the law violated the Establishment Clause, 512 U. S., at 690, in part because it "single[d] out a particular religious sect for special treatment," *id.*, at 706 (footnote omitted). RLUIPA presents no such defect. It confers no privileged status on any particular religious sect, and singles out no bona fide faith for disadvantageous treatment.

B

The Sixth Circuit misread our precedents to require invalidation of RLUIPA as "impermissibly advancing religion by giving greater protection to religious rights than to other constitutionally protected rights." 349 F. 3d, at 264. Our decision in *Amos* counsels otherwise. There, we upheld against an Establishment Clause challenge a provision exempting "religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion." 483 U. S., at 329. The District Court in *Amos*, reasoning in part that the exemption improperly "single[d] out religious entities for a benefit," *id.*, at 338, had "declared the statute unconstitutional as applied to secular activity," *id.*, at 333. Religious accommodations, we held, need not "come packaged with benefits to secular entities." *Id.*, at 338; see *Madison*, 355 F. 3d, at 318 ("There is no requirement that legislative protections for fundamental rights march in lockstep.").

Were the Court of Appeals' view the correct reading of our decisions, all manner of religious accommodations would fall. Congressional permission for members of the military to wear religious apparel while in uniform would fail, see 10 U. S. C. §774, as would accommodations Ohio itself makes. Ohio could not, as it now does, accommodate "traditionally recognized" religions, 221 F. Supp. 2d, at 832: The State provides inmates with chaplains "but not with publicists or political consultants," and allows "prisoners to assemble

for worship, but not for political rallies," Reply Brief for United States 5.

In upholding RLUIPA's institutionalized-persons provision, we emphasize that respondents "have raised a facial challenge to [the Act's] constitutionality, and have not contended that under the facts of any of [petitioners'] specific cases . . . [that] applying RLUIPA would produce unconstitutional results." 221 F. Supp. 2d, at 831. The District Court, noting the underdeveloped state of the record, concluded: A finding "that it is *factually impossible* to provide the kind of accommodations that RLUIPA will require without significantly compromising prison security or the levels of service provided to other inmates" cannot be made at this juncture. *Id.*, at 848 (emphasis added).[13] We agree.

"For more than a decade, the federal Bureau of Prisons has managed the largest correctional system in the Nation under the same heightened scrutiny standard as RLUIPA without compromising prison security, public safety, or the constitutional rights of other prisoners." Brief for United States 24 (citation omitted). The Congress that enacted RLUIPA was aware of the Bureau's experience. See Joint Statement 16700 (letter from Dept. of Justice to Sen. Hatch) ("[W]e do not believe [RLUIPA] would have an unreasonable

[13] Respondents argue that prison gangs use religious activity to cloak their illicit and often violent conduct. The instant case was considered below on a motion to dismiss. Thus, the parties' conflicting assertions on this matter are not before us. It bears repetition, however, that prison security is a compelling state interest, and that deference is due to institutional officials' expertise in this area. See *supra*, at 722–723. Further, prison officials may appropriately question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is authentic. Although RLUIPA bars inquiry into whether a particular belief or practice is "central" to a prisoner's religion, see 42 U. S. C. §2000cc–5(7)(A), the Act does not preclude inquiry into the sincerity of a prisoner's professed religiosity. Cf. *Gillette* v. *United States*, 401 U. S. 437, 457 (1971) ("'[T]he "truth" of a belief is not open to question'; rather, the question is whether the objector's beliefs are 'truly held.'" (quoting *United States* v. *Seeger*, 380 U. S. 163, 185 (1965))).

impact on prison operations. RFRA has been in effect in the Federal prison system for six years and compliance with that statute has not been an unreasonable burden to the Federal prison system."). We see no reason to anticipate that abusive prisoner litigation will overburden the operations of state and local institutions. The procedures mandated by the Prison Litigation Reform Act of 1995, we note, are designed to inhibit frivolous filings.[14]

Should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition. In that event, adjudication in as-applied challenges would be in order.

* * *

For the reasons stated, the judgment of the United States Court of Appeals for the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

JUSTICE THOMAS, concurring.

I join the opinion of the Court. I agree with the Court that the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) is constitutional under our modern Establishment Clause case law.[1] I write to explain why a

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[14] See *supra*, at 723, n. 12.

[1] The Court properly declines to assess RLUIPA under the discredited test of *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), which the Court of Appeals applied below, 349 F. 3d 257, 262–268 (CA6 2003). *Lemon* held that, to avoid invalidation under the Establishment Clause, a statute "must have a secular legislative purpose," "its principal or primary effect must be one that neither advances nor inhibits religion," and it "must not foster an excessive government entanglement with religion." 403 U. S., at 612–613 (internal quotation marks omitted). Under the first and second prongs, RLUIPA—and, indeed, any accommodation of religion—might well violate the Clause. Even laws *disestablishing* religion might violate

proper historical understanding of the Clause as a federalism provision leads to the same conclusion.[2]

## I

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." Amdt. 1. As I have explained, an important function of the Clause was to "ma[ke] clear that Congress could not interfere with state establishments." *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 50 (2004) (opinion concurring in judgment). The Clause, then, "is best understood as a

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the Clause. Disestablishment might easily have a religious purpose and thereby flunk the first prong, or it might well "strengthen and revitalize" religion and so fail the second. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 Wm. & Mary L. Rev. 2105, 2206–2207 (2003) (hereinafter McConnell).

[2] The Court dismisses the parties' arguments about the federalism aspect of the Clause with the brief observation that the Court of Appeals did not address the issue. *Ante*, at 718, n. 7. The parties' contentions on this point, however, are fairly included in the question presented, which asks "[w]hether Congress violated the Establishment Clause by enacting [RLUIPA]." Pet. for Cert. i. Further, both parties have briefed the federalism understanding of the Clause, Brief for Respondents 25–33; Reply Brief for Petitioners 12–16, and neither suggests that a remand on it would be useful or that the record in this Court lacks relevant facts, *Good News Club* v. *Milford Central School*, 533 U. S. 98, 119, n. 9 (2001).

Also, though RLUIPA is entirely consonant with the Establishment Clause, it may well exceed Congress' authority under either the Spending Clause or the Commerce Clause. See *Sabri* v. *United States*, 541 U. S. 600, 613 (2004) (THOMAS, J., concurring in judgment) (for a Spending Clause condition on a State's receipt of funds to be "Necessary and Proper" to the expenditure of the funds, there must be "some obvious, simple, and direct relation" between the condition and the expenditure of the funds); *United States* v. *Lopez*, 514 U. S. 549, 587 (1995) (THOMAS, J., concurring) ("The Constitution not only uses the word 'commerce' in a narrower sense than our case law might suggest, it also does not support the proposition that Congress has authority over all activities that 'substantially affect' interstate commerce"). The Court, however, properly declines to reach those issues, since they are outside the question presented and were not addressed by the Court of Appeals.

federalism provision" that "protects state establishments from federal interference." *Ibid.*; see also *Zelman* v. *Simmons-Harris*, 536 U. S. 639, 677–680 (2002) (THOMAS, J., concurring); *Lee* v. *Weisman*, 505 U. S. 577, 641 (1992) (SCALIA, J., dissenting). Ohio contends that this federalism understanding of the Clause prevents federal oversight of state choices within the "'play in the joints'" between the Free Exercise and Establishment Clauses. *Locke* v. *Davey*, 540 U. S. 712, 718–719 (2004). In other words, Ohio asserts that the Clause protects the States from federal interference with otherwise constitutionally permissible choices regarding religious policy. In Ohio's view, RLUIPA intrudes on such state policy choices and hence violates the Clause.

Ohio's vision of the range of protected state authority overreads the Clause. Ohio and its *amici* contend that, even though "States can no longer establish preferred churches" because the Clause has been incorporated against the States through the Fourteenth Amendment,[3] "Congress is as unable as ever to contravene constitutionally permissible *State choices regarding religious policy.*" Brief for Respondents 26 (emphasis added); Brief for Commonwealth of Virginia et al. as *Amici Curiae* 6–13. That is not what the Clause says. The Clause prohibits Congress from enacting legislation "respecting an *establishment* of religion" (emphasis added); it does not prohibit Congress from enacting legislation "respecting religion" or "taking cognizance of religion."

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[3] Ohio claims the benefit of the federalism aspect of the Clause, yet simultaneously adheres to the view that the Establishment Clause was incorporated against the States through the Fourteenth Amendment. Brief for Respondents 25–26. These positions may be incompatible. The text and history of the Clause may well support the view that the Clause is not incorporated against the States precisely because the Clause shielded state establishments from congressional interference. *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 50–51 (2004) (THOMAS, J., concurring in judgment). I note, however, that a state law that would violate the incorporated Establishment Clause might also violate the Free Exercise Clause. *Id.*, at 53, n. 4, 54, n. 5.

P. Hamburger, Separation of Church and State 106–107 (2002). At the founding, establishment involved "'coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*,'" *Newdow*, *supra*, at 52 (THOMAS, J., concurring in judgment) (quoting *Lee*, *supra*, at 640–641 (SCALIA, J., dissenting), in turn citing L. Levy, The Establishment Clause 4 (1986)), including "'governmental preferences for *particular* religious faiths,'" 542 U. S., at 53 (quoting *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 856 (1995) (THOMAS, J., concurring)). In other words, establishment at the founding involved, for example, mandatory observance or mandatory payment of taxes supporting ministers. See 542 U. S., at 52 (THOMAS, J., concurring in judgment); *Lee*, *supra*, at 640–641 (SCALIA, J., dissenting); McConnell 2131; L. Levy, The Establishment Clause: Religion and the First Amendment 10 (2d ed. 1994). To proscribe Congress from making laws "respecting an establishment of religion," therefore, was to forbid legislation respecting coercive state establishments, not to preclude Congress from legislating on religion generally.

History, at least that presented by Ohio, does not show that the Clause hermetically seals the Federal Government out of the field of religion. Ohio points to, among other things, the words of James Madison in defense of the Constitution at the Virginia Ratifying Convention: "There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation." General Defense of the Constitution (June 12, 1788), reprinted in 11 Papers of James Madison 130 (R. Rutland, C. Hobson, W. Rachal, & J. Sisson eds. 1977). Ohio also relies on James Iredell's statement discussing the Religious Test Clause at the North Carolina Ratifying Convention:

> "[Congress] certainly [has] no authority to interfere in the establishment of any religion whatsoever . . . . Is there any power given to Congress in matters of reli-

> gion? Can they pass a single act to impair our religious liberties? If they could, it would be a just cause of alarm . . . . If any future Congress should pass an act concerning the religion of the country, it would be an act which they are not authorized to pass, by the Constitution, and which the people would not obey." Debate in North Carolina Ratifying Convention (July 30, 1788), in 5 Founders' Constitution 90 (P. Kurland & R. Lerner eds. 1987).

These quotations do not establish the Framers' beliefs about the scope of the Establishment Clause. Instead, they demonstrate only that some of the Framers may have believed that the National Government had no authority to legislate concerning religion, because no enumerated power gave it that authority. Ohio's Spending Clause and Commerce Clause challenges, therefore, may well have merit. See n. 2, *supra*.

In any event, Ohio has not shown that the Establishment Clause codified Madison's or Iredell's view that the Federal Government could not legislate regarding religion. An *unenacted* version of the Clause, proposed in the House of Representatives, demonstrates the opposite. It provided that "Congress shall make no laws touching religion, or infringing the rights of conscience." 1 Annals of Cong. 731 (1789); see also *Wallace* v. *Jaffree*, 472 U. S. 38, 96–97 (1985) (REHNQUIST, J., dissenting). The words ultimately adopted, "Congress shall make no law respecting an establishment of religion," "identified a position from which [Madison] had once sought to distinguish his own," Hamburger, Separation of Church and State, at 106. Whatever he thought of those words, "he clearly did not mind language less severe than that which he had [previously] used." *Ibid.* The version of the Clause finally adopted is narrower than Ohio claims.

Nor does the other historical evidence on which Ohio relies—Joseph Story's Commentaries on the Constitution—prove its theory. Leaving aside the problems with relying

on this source as an indicator of the original understanding, see *U. S. Term Limits, Inc.* v. *Thornton*, 514 U. S. 779, 856 (1995) (THOMAS, J., dissenting), it is unpersuasive in its own right. Justice Story did say that "the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions." Commentaries on the Constitution of the United States 702–703 (1833) (reprinted 1987). In context, however, his statement concerned only Congress' inability to legislate with respect to religious *establishment*. See *id.*, at 701 ("The real object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government"); *id.*, at 702 ("[I]t was deemed advisable to exclude from the national government all power to act upon the subject . . . . It was impossible, that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendancy, if the national government were left free to create a religious establishment").

In short, the view that the Establishment Clause precludes Congress from legislating respecting religion lacks historical provenance, at least based on the history of which I am aware. Even when enacting laws that bind the States pursuant to valid exercises of its enumerated powers, Congress need not observe strict separation between church and state, or steer clear of the subject of religion. It need only refrain from making laws "respecting an establishment of religion"; it must not interfere with a state establishment of religion. For example, Congress presumably could not require a State to establish a religion any more than it could preclude a State from establishing a religion.

## II

On its face—the relevant inquiry, as this is a facial challenge—RLUIPA is not a law "respecting an establishment of

religion." RLUIPA provides, as relevant: "No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person," first, "further[s] a compelling governmental interest," and second, "is the least restrictive means of furthering that compelling governmental interest." 42 U. S. C. §§2000cc–1(a)(1)–(2). This provision does not prohibit or interfere with state establishments, since no State has established (or constitutionally could establish, given an incorporated Clause) a religion. Nor does the provision require a State to establish a religion: It does not force a State to coerce religious observance or payment of taxes supporting clergy, or require a State to prefer one religious sect over another. It is a law respecting religion, but not one respecting an establishment of religion.

In addition, RLUIPA's text applies to all laws passed by state and local governments, including "rule[s] of general applicability," *ibid.*, whether or not they concern an establishment of religion. State and local governments obviously have many laws that have nothing to do with religion, let alone establishments thereof. Numerous applications of RLUIPA therefore do not contravene the Establishment Clause, and a facial challenge based on the Clause must fail. See *United States* v. *Booker*, 543 U. S. 220, 314 (2005) (THOMAS, J., concurring in part and dissenting in part); *United States* v. *Salerno*, 481 U. S. 739, 745 (1987).

It also bears noting that Congress, pursuant to its Spending Clause authority, conditioned the States' receipt of federal funds on their compliance with RLUIPA. §2000cc–1(b)(1) ("This section applies in any case in which . . . the substantial burden is imposed in a program or activity that receives Federal financial assistance"). As noted above, n. 2, *supra*, RLUIPA may well exceed the spending power. Nonetheless, while Congress' condition stands, the States

subject themselves to that condition by voluntarily accepting federal funds. The States' voluntary acceptance of Congress' condition undercuts Ohio's argument that Congress is encroaching on its turf.

Syllabus

# TORY ET AL. *v.* COCHRAN

## CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

No. 03–1488. Argued March 22, 2005—Decided May 31, 2005

In a state-law defamation action filed by attorney Johnnie L. Cochran, Jr., a California trial court found that petitioner Tory, assisted by petitioner Craft and others, had, *inter alia*, falsely claimed that Cochran owed him money, picketed Cochran's office with signs containing insults and obscenities, and pursued Cochran while chanting similar threats and insults, in order to coerce Cochran into paying Tory money to desist from such libelous and slanderous activity. Because Tory indicated that he would continue to engage in the activity absent a court order, the court permanently enjoined petitioners and their agents from, among other things, picketing, displaying signs, and making oral statements about Cochran and his firm in any public forum. The California Court of Appeal affirmed, and this Court granted certiorari. After oral argument, Cochran's counsel informed the Court of Cochran's death, moved to substitute Cochran's widow as respondent, and suggested that the case be dismissed as moot. Petitioners agreed to the substitution, but denied that the case was moot.

*Held:* Cochran's widow is substituted as respondent, but the case is not moot. Despite Cochran's death, the injunction remains in effect. Nothing in its language says to the contrary. Cochran's counsel argues that the injunction is still necessary, valid, and enforceable, and no source of California law says that it automatically became invalid upon Cochran's death. As this Court understands that law, a person cannot definitively know whether an injunction is legally void until a court has ruled that it is. Given this uncertainty, the injunction here continues significantly to restrain petitioners' speech, thus presenting an ongoing federal controversy. Cochran's death, however, makes it unnecessary for this Court to explore petitioners' basic claims. Rather, the Court need only point out that the injunction, as written, has lost its underlying rationale. Since picketing Cochran and his law offices while engaging in injunction-forbidden speech could no longer coerce Cochran to pay for desisting in this activity, the grounds for the injunction are much diminished or have disappeared altogether. Consequently the injunction amounts to an overly broad prior restraint upon speech, lacking plausible justification. Pp. 736–739.

Vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, and GINSBURG, JJ., joined. THOMAS, J., filed a dissenting opinion, in which SCALIA, J., joined, *post*, p. 739.

*Erwin Chemerinsky* argued the cause for petitioners. With him on the briefs were *Gary L. Bostwick* and *Jean-Paul Jassy.*

*Jonathan B. Cole* argued the cause for respondent. With him on the brief were *Karen K. Coffin* and *Susan S. Baker.**

JUSTICE BREYER delivered the opinion of the Court.

Johnnie Cochran brought a state-law defamation action against petitioner Ulysses Tory. The state trial court determined that Tory (with the help of petitioner Ruth Craft and others) had engaged in unlawful defamatory activity. It found, for example, that Tory, while claiming falsely that Cochran owed him money, had complained to the local bar association, had written Cochran threatening letters demanding $10 million, had picketed Cochran's office holding up signs containing various insults and obscenities; and, with a group of associates, had pursued Cochran while chanting similar threats and insults. App. 38, 40–41. The court concluded that Tory's claim that Cochran owed him money was without foundation, that Tory engaged in a continuous pattern of libelous and slanderous activity, and that Tory had

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*Briefs of *amici curiae* urging reversal were filed for the American Federation of Labor and Congress of Industrial Organizations by *Jonathan P. Hiatt, James B. Coppess,* and *Laurence Gold;* for the Thomas Jefferson Center for the Protection of Free Expression by *Robert M. O'Neil* and *J. Joshua Wheeler;* for Alfred L. Brophy et al. by *Michael I. Meyerson, pro se;* and for Michelangelo Delfino et al. by *Jon B. Eisenberg* and *Jeremy B. Rosen.*

*Kelli L. Sager, Jeffrey L. Fisher, Jerry S. Birenz, Richard A. Bernstein, Jonathan Bloom, Harold W. Fuson, Jr., Thomas B. Kelley, Steven D. Zansberg, Eve Burton, Jonathan R. Donnellan, Karlene Goller, George Freeman, Lucy A. Dalglish,* and *Eric N. Lieberman* filed a brief for Los Angeles Times Communications LLC et al. as *amici curiae.*

used false and defamatory speech to "coerce" Cochran into paying "amounts of money to which Tory was not entitled" as a "tribute" or a "premium" for "desisting" from this libelous and slanderous activity. *Id.*, at 39, 42–43.

After noting that Tory had indicated that he would continue to engage in this activity in the absence of a court order, the Superior Court issued a permanent injunction. The injunction, among other things, prohibited Tory, Craft, and their "agents" or "representatives" from "picketing," from "displaying signs, placards or other written or printed material," and from "orally uttering statements" about Johnnie L. Cochran, Jr., and about Cochran's law firm in "any public forum." *Id.*, at 34.

Tory and Craft appealed. The California Court of Appeal affirmed. Tory and Craft then filed a petition for a writ of certiorari, raising the following question:

> "Whether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment." Pet. for Cert. i.

After oral argument, Cochran's counsel informed the Court of Johnnie Cochran's recent death. Counsel also moved to substitute Johnnie Cochran's widow, Sylvia Dale Mason Cochran, as respondent, and suggested that we dismiss the case as moot. Tory and Craft filed a response agreeing to the substitution of Ms. Cochran. But they denied that the case was moot.

We agree with Tory and Craft that the case is not moot. Despite Johnnie Cochran's death, the injunction remains in effect. Nothing in its language says to the contrary. Cochran's counsel tells us that California law does not recognize a "cause of action for an injury to the memory of a deceased person's reputation," see *Kelly* v. *Johnson Pub. Co.*, 160 Cal. App. 2d 718, 325 P. 2d 659 (1958), which circumstance, counsel believes, "moots" a "*portion*" of the injunc-

tion (the portion "personal to Cochran"). Respondent's Suggestion of Death, etc., 4 (emphasis added). But counsel adds that "[t]he [i]njunction continues to be necessary, valid and enforceable." *Id.*, at 9. The parties have not identified, nor have we found, any source of California law that says the injunction here *automatically* becomes invalid upon Cochran's death, not even the portion personal to Cochran. Counsel also points to the "value of" Cochran's "law practice" and adds that his widow has an interest in enforcing the injunction. *Id.*, at 11–12. And, as we understand California law, a person cannot definitively know whether an injunction is legally void until a court has ruled that it is. See *Mason* v. *United States Fidelity & Guaranty Co.*, 60 Cal. App. 2d 587, 591, 141 P. 2d 475, 477–478 (1943) ("[W]here the party served believes" a court order "invalid he should take the proper steps to have it dissolved"); *People* v. *Gonzalez*, 12 Cal. 4th 804, 818, 910 P. 2d 1366, 1375 (1996) ("[A] person subject to a court's injunction may elect whether to challenge the constitutional validity of the injunction when it is issued, or to reserve that claim until a violation of the injunction is charged as a contempt of court"). Given the uncertainty of California law, we take it as a given that the injunction here continues significantly to restrain petitioners' speech, presenting an ongoing federal controversy. See, *e. g.*, *Dombrowski* v. *Pfister*, 380 U. S. 479, 486–487 (1965); *NAACP* v. *Button*, 371 U. S. 415, 432–433 (1963). Consequently, we need not, and we do not, dismiss this case as moot. Cf. *Firefighters* v. *Stotts*, 467 U. S. 561, 569 (1984) (case not moot in part because it appears from "terms" of the injunction that it is "still in force" and "unless set aside must be complied with").

At the same time, Johnnie Cochran's death makes it unnecessary, indeed unwarranted, for us to explore petitioners' basic claims, namely, (1) that the First Amendment forbids the issuance of a permanent injunction in a defamation case, at least when the plaintiff is a public figure, and (2) that

the injunction (considered prior to Cochran's death) was not properly tailored and consequently violated the First Amendment. See Brief for Petitioners ii, iii. Rather, we need only point out that the injunction, as written, has now lost its underlying rationale. Since picketing Cochran and his law offices while engaging in injunction-forbidden speech could no longer achieve the objectives that the trial court had in mind (*i. e.*, coercing Cochran to pay a "tribute" for desisting in this activity), the grounds for the injunction are much diminished, if they have not disappeared altogether. Consequently the injunction, as written, now amounts to an overly broad prior restraint upon speech, lacking plausible justification. See *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 559 (1976) ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights"); *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 390 (1973) (a prior restraint should not "swee[p]" any "more broadly than necessary"). As such, the Constitution forbids it. See *Carroll* v. *President and Comm'rs of Princess Anne*, 393 U. S. 175, 183–184 (1968) (An "order" issued in "the area of First Amendment rights" must be "precis[e]" and narrowly "tailored" to achieve the "pin-pointed objective" of the "needs of the case"); see also *Board of Airport Comm'rs of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U. S. 569, 575, 577 (1987) (regulation prohibiting "all 'First Amendment activities'" substantially overbroad).

We consequently grant the motion to substitute Sylvia Dale Mason Cochran for Johnnie Cochran as respondent. We vacate the judgment of the California Court of Appeal, and we remand the case for proceedings not inconsistent with this opinion. If, as the Cochran supplemental brief suggests, injunctive relief may still be warranted, any appropriate party remains free to ask for such relief. We express no view on the constitutional validity of any such new re-

lief, tailored to these changed circumstances, should it be entered.

*It is so ordered.*

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, dissenting.

I would dismiss the writ of certiorari as improvidently granted. We granted the writ, as the Court notes, to decide

> "[w]hether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment." Pet. for Cert. i; *ante*, at 736.

Whether or not Johnnie Cochran's death moots this case, it certainly renders the case an inappropriate vehicle for resolving the question presented. The Court recognizes this, *ante*, at 737–738, but nevertheless vacates the judgment below, *ante*, at 738. It does so only after deciding, as it must to exercise jurisdiction, that in light of the uncertainty in California law, the case is not moot. *Ante*, at 736–737; *ASARCO Inc.* v. *Kadish*, 490 U. S. 605, 621, n. 1 (1989) (when a case coming from a state court becomes moot, this Court "lack[s] jurisdiction and thus also the power to disturb the state court's judgment"); see also *City News & Novelty, Inc.* v. *Waukesha*, 531 U. S. 278, 283–284 (2001).

In deciding the threshold mootness issue, a complicated problem in its own right, the Court strains to reach the validity of the injunction after Cochran's death. Whether the injunction remains valid in these changed circumstances is neither the reason we took this case nor an important question, but merely a matter of case-specific error correction. Petitioners remain free to seek relief on both constitutional and state-law grounds in the California courts. And, if the injunction is invalid, they need not obey it: California does not recognize the "collateral bar" rule, and thus permits collateral challenges to injunctions in contempt proceedings.

*People* v. *Gonzalez*, 12 Cal. 4th 804, 818, 910 P. 2d 1366, 1375 (1996) (a person subject to an injunction may challenge "the constitutional validity of the injunction when it is issued, or . . . reserve that claim until a violation of the injunction is charged as a contempt of court"). The California courts can resolve the matter and, given the new state of affairs, might very well adjudge the case moot or the injunction invalid on state-law grounds rather than the constitutional grounds the Court rushes to embrace. As a prudential matter, the better course is to avoid passing unnecessarily on the constitutional question. See *Ashwander* v. *TVA*, 297 U. S. 288, 345–348 (1936) (Brandeis, J., concurring).

The Court purports to save petitioners the uncertainty of possible enforcement of the injunction, and thereby to prevent any chill on their First Amendment rights, by vacating the judgment below. But what the Court gives with the left hand it takes with the right, for it only invites further litigation by pronouncing that "injunctive relief may still be warranted," conceding that "any appropriate party remains free to ask for such relief," and "express[ing] no view on the constitutional validity of any such new relief." *Ante*, at 738–739. What the Court means by "any appropriate party" is unclear. Perhaps the Court means Sylvia Dale Mason Cochran, Cochran's widow, who has taken his place in this suit. Or perhaps it means the Cochran firm, which has never been a party to this case, but may now (if "appropriate") intervene and attempt to enjoin the defamation of a now-deceased third party. The Court's decision invites the doubts it seeks to avoid. Its decision is unnecessary and potentially self-defeating. The more prudent course is to dismiss the writ as improvidently granted. I respectfully dissent.

## REPORTER'S NOTE

The next page is purposely numbered 901. The numbers between 740 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

# ORDERS FOR MARCH 7 THROUGH MAY 31, 2005

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## MARCH 7, 2005

*Certiorari Granted—Vacated and Remanded*

No. 03–7999. JONES *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Reported below: 74 Fed. Appx. 317;

No. 03–8067. CAPETILLO *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Reported below: 71 Fed. Appx. 348;

No. 03–10877. JOHNSON *v.* VIRGINIA. Sup. Ct. Va. Reported below: 267 Va. 53, 591 S. E. 2d 47;

No. 03–11049. BARRAZA *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. Ct. Crim. App. Tex.;

No. 04–6155. DUKE *v.* ALABAMA. Ct. Crim. App. Ala. Reported below: 889 So. 2d 1; and

No. 04–6643. DYCUS *v.* MISSISSIPPI. Sup. Ct. Miss. Reported below: 875 So. 2d 140. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Roper* v. *Simmons*, 543 U. S. 551 (2005).

No. 04–975. LEWIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Booker*, 543 U. S. 220 (2005). Reported below: 108 Fed. Appx. 983.

No. 04–7074. BAEZ *v.* BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Clark* v. *Martinez*, 543 U. S. 371 (2005). Reported below: 100 Fed. Appx. 268.

No. 04–7533. GORDON, AKA JONES *v.* UNITED STATES. C. A. 3d Cir. Reported below: 104 Fed. Appx. 275;

No. 04–7589. MORTIER *v.* UNITED STATES. C. A. 7th Cir. Reported below: 110 Fed. Appx. 687;

No. 04–8009. GREENE *v.* UNITED STATES. C. A. 4th Cir. Reported below: 108 Fed. Appx. 814;

No. 04–8240. PIDCOKE *v.* UNITED STATES. C. A. 5th Cir. Reported below: 111 Fed. Appx. 278;

No. 04–8251. POWELL *v.* UNITED STATES. C. A. 5th Cir. Reported below: 111 Fed. Appx. 299;

No. 04–8307. SANCHEZ-FLORES *v.* UNITED STATES. C. A. 5th Cir. Reported below: 110 Fed. Appx. 463;

No. 04–8309. SMITH *v.* UNITED STATES. C. A. 11th Cir. Reported below: 124 Fed. Appx. 642;

No. 04–8322. GAONA-TOVAR *v.* UNITED STATES; and DUARTE-JUAREZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 110 Fed. Appx. 438 (first judgment) and 461 (second judgment);

No. 04–8326. GOODEN *v.* UNITED STATES. C. A. 5th Cir. Reported below: 111 Fed. Appx. 297;

No. 04–8357. FULKS, AKA WELLINGTON *v.* UNITED STATES. C. A. 4th Cir. Reported below: 113 Fed. Appx. 507;

No. 04–8360. CRUZ-PEREZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 110 Fed. Appx. 457;

No. 04–8369. LOPEZ *v.* UNITED STATES. C. A. 2d Cir. Reported below: 372 F. 3d 86;

No. 04–8374. MENG TUAN WANG *v.* UNITED STATES. C. A. 5th Cir.;

No. 04–8396. TELLEZ-BOIZO *v.* UNITED STATES. C. A. 7th Cir. Reported below: 114 Fed. Appx. 754;

No. 04–8402. BOWDEN *v.* UNITED STATES. C. A. 6th Cir. Reported below: 380 F. 3d 266;

No. 04–8422. GREEN *v.* UNITED STATES. C. A. 6th Cir. Reported below: 101 Fed. Appx. 578;

No. 04–8429. CHICAS-SANCHEZ *v.* UNITED STATES. C. A. 9th Cir. Reported below: 114 Fed. Appx. 884;

No. 04–8433. BROOKS *v.* UNITED STATES. C. A. 4th Cir. Reported below: 111 Fed. Appx. 701;

No. 04–8441. MITCHELL *v.* UNITED STATES. C. A. 11th Cir. Reported below: 116 Fed. Appx. 245;

No. 04–8455. PIPKINS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Reported below: 378 F. 3d 1281; and

No. 04–8505. LEVY *v.* UNITED STATES. C. A. 11th Cir. Reported below: 125 Fed. Appx. 269. Motions of petitioners for

leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Booker*, 543 U. S. 220 (2005).

*Miscellaneous Orders*

No. 04M57. SHECHET *v.* SHECHET. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 04–480. METRO-GOLDWYN-MAYER STUDIOS INC. ET AL. *v.* GROKSTER, LTD., ET AL. C. A. 9th Cir. [Certiorari granted, 543 U. S. 1032.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 04–495. WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL. *v.* AUSTIN ET AL. C. A. 6th Cir. [Certiorari granted, 543 U. S. 1032.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 04–603. GRABLE & SONS METAL PRODUCTS, INC. *v.* DARUE ENGINEERING & MANUFACTURING. C. A. 6th Cir. [Certiorari granted, 543 U. S. 1042.] Motion of respondent to dispense with printing the joint appendix granted. Motion of Jerome Milulski et ux. for leave to file a brief as *amici curiae* granted.

No. 04–8639. IN RE TWITTY. Petition for writ of habeas corpus denied.

No. 04–8023. IN RE NIMMONS. Petition for writ of mandamus denied.

*Certiorari Granted*

No. 04–759. UNITED STATES *v.* OLSON ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 362 F. 3d 1236.

No. 04–905. VOLVO TRUCKS NORTH AMERICA, INC. *v.* REEDER-SIMCO GMC, INC. C. A. 8th Cir. Motions of National Association of State Directors of Pupil Transportation, Truck Manufacturers Association et al., and Washington Legal Foundation for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 374 F. 3d 701.

*Certiorari Denied*

No. 04–510. RICCARDO *v.* RAUSCH. C. A. 7th Cir. Certiorari denied. Reported below: 375 F. 3d 521.

No. 04–589. BRINK'S CO., FKA PITTSTON CO., ET AL. *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 368 F. 3d 385.

No. 04–602. NAMER ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 376 F. 3d 317.

No. 04–626. GLENDALE FEDERAL BANK, FSB *v.* UNITED STATES; and

No. 04–786. UNITED STATES *v.* GLENDALE FEDERAL BANK, FSB. C. A. Fed. Cir. Certiorari denied. Reported below: 378 F. 3d 1308.

No. 04–722. MARTIN BROS. CONTAINER & TIMBER PRODUCTS CORP. ET AL. *v.* MARTIN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 395.

No. 04–727. COVAD COMMUNICATIONS CO. ET AL. *v.* BELLSOUTH CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 374 F. 3d 1044.

No. 04–736. DAIMLERCHRYSLER CANADA, INC., ET AL. *v.* JAYNES ET AL. C. A. 1st Cir. Certiorari denied.

No. 04–740. SSA GULF, INC. *v.* MAGEE. C. A. 5th Cir. Certiorari denied.

No. 04–742. DOE, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 372 F. 3d 1347.

No. 04–748. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY *v.* BARBOUR ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 374 F. 3d 1161.

No. 04–766. LAMERS DAIRY, INC. *v.* DEPARTMENT OF AGRICULTURE. C. A. 7th Cir. Certiorari denied. Reported below: 379 F. 3d 466.

No. 04–768. CERVINI *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 379 F. 3d 987.

No. 04–888. BURTON ET AL. *v.* RICHMOND ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 370 F. 3d 723.

No. 04–892. RHOADS *v.* BOARD OF TRUSTEES OF THE CITY OF CALUMET CITY POLICEMEN'S PENSION FUND. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 348 Ill. App. 3d 835, 810 N. E. 2d 573.

No. 04–897. UNITED STEELWORKERS OF AMERICA, AFL–CIO, CLC *v.* PENSION BENEFIT GUARANTY CORPORATION. C. A. 6th Cir. Certiorari denied. Reported below: 386 F. 3d 659.

No. 04–898. BARCLAY ET AL. *v.* BANK OF NEW YORK. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 04–902. MURPHY *v.* METROPOLITAN TRANSIT AUTHORITY. C. A. 5th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 662.

No. 04–906. ZIMMER *v.* SOUTHWESTERN BELL TELEPHONE CO. C. A. 5th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 172.

No. 04–911. KEYSTONE LAND & DEVELOPMENT CO. *v.* XEROX CORP. C. A. 9th Cir. Certiorari denied. Reported below: 378 F. 3d 949.

No. 04–921. BICYCLE COMPONENTS EXPRESS, INC., DBA SOLEUS *v.* BRUNSWICK CORP. ET AL. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 347 Ill. App. 3d 1114, 867 N. E. 2d 121.

No. 04–927. BROUSSARD *v.* CITGO PETROLEUM CORP. C. A. 5th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 272.

No. 04–931. SAMODUMOVA *v.* GONZALES, ATTORNEY GENERAL; and SAMODUMOV ET AL. *v.* GONZALES, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 388 (first judgment) and 406 (second judgment).

No. 04–936. NIBCO, INC. *v.* RIVERA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 364 F. 3d 1057.

No. 04–940. ILLINOIS *v.* TORRES. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 347 Ill. App. 3d 252, 807 N. E. 2d 654.

No. 04–943. KITTERY RETAIL VENTURES, LLC, ET AL. *v.* TOWN OF KITTERY, MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 856 A. 2d 1183.

No. 04–946. KELLER *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 125 S. W. 3d 600.

No. 04–964. MILLS *v.* RHODE ISLAND DEPARTMENT OF HEALTH, BOARD OF MEDICAL LICENSURE AND DISCIPLINE, ET AL. Sup. Ct. R. I. Certiorari denied. Reported below: 863 A. 2d 202.

No. 04–998. COVUCCI *v.* SERVICE MERCHANDISE CO., INC. C. A. 6th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 797.

No. 04–1008. CHEATHAM *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 244.

No. 04–1010. HILGERS *v.* NORTH DAKOTA. Sup. Ct. N. D. Certiorari denied. Reported below: 685 N. W. 2d 109.

No. 04–1015. JOHNSON *v.* INDIANA. Ct. App. Ind. Certiorari denied. Reported below: 803 N. E. 2d 1255.

No. 04–7174. HOLLAND *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 878 So. 2d 1.

No. 04–7458. NEWTON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–7497. NEWTON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. Ct. Crim. App. Tex. Certiorari denied.

No. 04–7697. GILMORE *v.* UNITED STATES POSTAL SERVICE. C. A. Fed. Cir. Certiorari denied. Reported below: 104 Fed. Appx. 734.

No. 04–7880. RUDOLPH *v.* GALETKA, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 565.

No. 04–7887. MCDANIEL *v.* CRIST, ATTORNEY GENERAL OF FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–7896. RICHARDSON *v.* SISK ET AL. C. A. 4th Cir. Certiorari denied.

No. 04–7899. WINROW *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 04–7912. PHIFER *v.* WABASH VALLEY CORRECTIONAL FACILITY ET AL. C. A. 7th Cir. Certiorari denied.

No. 04–7914. MOORE *v.* TEXAS. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 04–7916. WEBB *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 04–7924. PHIFER *v.* WABASH VALLEY CORRECTIONAL FACILITY ET AL. C. A. 7th Cir. Certiorari denied.

No. 04–7932. POMPE *v.* FARWELL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–7941. BISHOP *v.* NORFOLK SOUTHERN RAILWAY CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 2.

No. 04–7943. ANAYA *v.* KERNAN, ACTING WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 491.

No. 04–7945. BEARDEN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–7946. BRANCH *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 882 So. 2d 36.

No. 04–7948. JAMISON *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 04–7951. MUNOZ *v.* COOPER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 04–7954. JENKINS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–7955. LOPEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–7956. DIAZ MALDONADO *v.* OLANDER, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 108 Fed. Appx. 708.

No. 04–7960. WARREN *v.* CRAWFORD, DIRECTOR, NEVADA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–7961. WOOTEN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–7962. WILHELM *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–7963. TORRES *v.* TEXAS. Ct. App. Tex., 8th Dist. Certiorari denied.

No. 04–7965. ROMER *v.* TRAVIS, CHAIRPERSON, NEW YORK BOARD OF PAROLE, ET AL. C. A. 2d Cir. Certiorari denied.

No. 04–7967. STEWARD *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–7968. SAMPLE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 04–7972. BASEY *v.* WATHEN ET AL. C. A. 5th Cir. Certiorari denied.

No. 04–7976. PETERSON *v.* WHOLE FOODS MARKET CALIFORNIA, INC. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 04–7977. MURILLO *v.* CAREY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–7982. MOSLEY *v.* SOBINA, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SOMERSET. C. A. 3d Cir. Certiorari denied.

No. 04–7987. GRAY *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 61 Mass. App. 1115, 810 N. E. 2d 1290.

No. 04–7992. HAMILTON *v.* NEWLAND, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 374 F. 3d 822.

No. 04–7993. WOODBERRY *v.* WERHOLTZ, SECRETARY, KANSAS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 118 Fed. Appx. 362.

No. 04–7997. BROWN, AKA WILLIAMS *v.* CARROLL, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 04–8003. HURST *v.* TRW, INC. C. A. 4th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 914.

No. 04–8005. COTA RAMIREZ *v.* BLACKETTER, SUPERINTENDENT, EASTERN OREGON CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 40.

No. 04–8006. QUEEN *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 358 N. C. 551, 599 S. E. 2d 515.

No. 04–8014. HAMMOND *v.* ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS ET AL. Sup. Ct. Ill. Certiorari denied.

No. 04–8015. HULL *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. C. A. 10th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 177.

No. 04–8016. DYSON *v.* IOWA. C. A. 8th Cir. Certiorari denied.

No. 04–8017. COOK *v.* CABANA. C. A. 5th Cir. Certiorari denied.

No. 04–8020. CHAPEL *v.* SMITH, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 04–8021. SHANK *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 04–8022. SCOTT *v.* UPTON, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 04–8024. OWEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 1001.

No. 04–8026. JACKSON *v.* RENICO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–8032. THURMOND *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 343 Ill. App. 3d 1295, 856 N. E. 2d 693.

No. 04–8035. ALLEN *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 120 Nev. 1217, 131 P. 3d 580.

No. 04–8051. CASTEEL *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 348 Ill. App. 3d 1098, 868 N. E. 2d 1104.

No. 04–8052. JAMES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 348 Ill. App. 3d 498, 810 N. E. 2d 96.

No. 04–8067. ROBERTS *v.* COHEN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 117 Fed. Appx. 504.

No. 04–8086. MARBOU *v.* GONZALES, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 04–8089. CASAS-CASTRILLON *v.* GONZALES, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 04–8094. CHAPMAN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 347 Ill. App. 3d 1105, 867 N. E. 2d 117.

No. 04–8109. MYRON *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–8156. ODOM *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 682.

No. 04–8160. ROMERO *v.* HAMLET, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 797.

No. 04–8165. LETOURNEAU *v.* HICKMAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 70.

No. 04–8201. DEVORE *v.* HILL, SUPERINTENDENT, SNAKE RIVER CORRECTIONAL INSTITUTION (two judgments). Sup. Ct. Ore. Certiorari denied.

No. 04–8232. WALTON *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 123 Fed. Appx. 387.

No. 04–8243. DANIELS ET UX. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 387 F. 3d 636.

No. 04–8248. SAVARESE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 385 F. 3d 15.

No. 04–8278. THACKER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 100 P. 3d 1052.

No. 04–8279. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 397 F. 3d 274.

No. 04–8293. SPENCER *v.* EASTER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 571.

No. 04–8339. WOOTEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 672.

No. 04–8350. VIGIL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 385 F. 3d 546.

No. 04–8377. POGGEMILLER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 375 F. 3d 686.

No. 04–8381. STEARNS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 387 F. 3d 104.

No. 04–8382. SCOTT *v.* HAINES, WARDEN. Sup. Ct. App. W. Va. Certiorari denied.

No. 04–8404. BAKER *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 386 F. 3d 1258.

No. 04–8406. ROMERO-GALLARDO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 113 Fed. Appx. 351.

No. 04–8409. HRONEK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–8445. LANGFORD *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 04–8451. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–8452. BLACKSHEAR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–8457. JIMENEZ *v.* MENDEZ, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 04–8460. DUSENBERRY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–8472. BROWN *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 5th Cir. Certiorari denied.

No. 04–8474. ALVAREZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 412.

No. 04–8476. POLLARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 389 F. 3d 101.

No. 04–8482. BIBB *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 122 Fed. Appx. 985.

No. 04–8488. YOUNG *v.* MCKELVY, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 122 Fed. Appx. 986.

No. 04–8489. CAMACHO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 370 F. 3d 303.

No. 04–8502. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–8509. BARREIRO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–8510. ALFORD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 706.

No. 04–8522. MASON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 469.

No. 04–8523. RODRIGUEZ-MARRERO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 390 F. 3d 1.

No. 04–8539. SANCHES MONTES, AKA MONTES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 105.

No. 04–8543. SAWYERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–8546. WELLONS, AKA THOMAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 252.

No. 04–8555. ADAMSON *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 04–8562. SAMUEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 708.

No. 04–8563. SIGALA-LOMELI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–8571. WOOD *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 386 F. 3d 961.

No. 04–8574. AJAJ *v.* SMITH, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 743.

No. 04–889. MILWAUKEE METROPOLITAN SEWERAGE DISTRICT *v.* FRIENDS OF MILWAUKEE'S RIVERS ET AL. C. A. 7th Cir. Motion of Association of Metropolitan Sewerage Agencies et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 382 F. 3d 743.

No. 04–8992 (04A761). SMITH *v.* ANDERSON, WARDEN. C. A. 6th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 402 F. 3d 718.

*Rehearing Denied*

No. 03–1293. WHITFIELD *v.* UNITED STATES, 543 U. S. 209;
No. 03–1294. HALL *v.* UNITED STATES, 543 U. S. 209;
No. 03–9505. TAYLOR *v.* UNITED STATES, 541 U. S. 1005;
No. 04–384. SAWYER *v.* WORCESTER ET AL., 543 U. S. 1001;
No. 04–614. KELLY *v.* ORANGE COUNTY, CALIFORNIA, 543 U. S. 1053;
No. 04–767. MOORE *v.* TENNESSEE DEPARTMENT OF CHILDREN'S SERVICES, 543 U. S. 1056;
No. 04–5911. AREVALO *v.* UNITED STATES, 543 U. S. 913;
No. 04–5990. WAYNE *v.* SANTA CLARA VALLEY TRANSPORTATION AUTHORITY, 543 U. S. 1057;
No. 04–6228. VONDETTE *v.* UNITED STATES, 543 U. S. 1108;

No. 04–6688. FRANKS *v.* GEORGIA, 543 U. S. 1058;

No. 04–6703. HOWARD *v.* PERDUE, GOVERNOR OF GEORGIA, ET AL., 543 U. S. 1027;

No. 04–6841. BUGGAGE *v.* SHEEHAN PIPELINE CONSTRUCTION CO., 543 U. S. 1060;

No. 04–6854. SPIDLE *v.* MISSOURI, 543 U. S. 1060;

No. 04–6909. BRADLEY *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 543 U. S. 1062;

No. 04–6950. ORTIZ-ROSAS *v.* UNITED STATES, 543 U. S. 1124;

No. 04–7018. TURNER *v.* VIRGINIA, 543 U. S. 1064;

No. 04–7044. EVERETT *v.* PENNSYLVANIA ET AL., 543 U. S. 1065;

No. 04–7320. SANTANA-MARTINEZ *v.* UNITED STATES, 543 U. S. 1073;

No. 04–7327. ZHANG *v.* CHARLES TOWN RACES & SLOTS ET AL., 543 U. S. 1074;

No. 04–7414. IN RE WASHINGTON, 543 U. S. 1119;

No. 04–7432. IN RE DOOSE, 543 U. S. 1048;

No. 04–7578. ALLEN *v.* UNITED STATES, 543 U. S. 1079;

No. 04–7651. ROYAL *v.* UNITED STATES, 543 U. S. 1094;

No. 04–7692. DORE *v.* UNITED STATES, 543 U. S. 1095;

No. 04–7721. DAWSON *v.* UNITED STATES, 543 U. S. 1128; and

No. 04–7800. JONES *v.* UNITED STATES, 543 U. S. 1130. Petitions for rehearing denied.

No. 04–5300. MCGEE *v.* MCDONALD'S RESTAURANTS OF CALIFORNIA, INC., ET AL., 543 U. S. 892. Motion for leave to file petition for rehearing denied.

## MARCH 8, 2005

*Certiorari Denied*

No. 04–7613 (04A606). HOPPER *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 106 Fed. Appx. 221.

MARCH 10, 2005

*Certiorari Denied*

No. 04–8994 (04A769). POWELL *v.* NORTH CAROLINA. Sup. Ct. N. C. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. Reported below: 359 N. C. 413, 612 S. E. 2d 130.

MARCH 14, 2005

*Miscellaneous Order.* (For the Court's order approving revisions to the Rules of this Court, see *post*, p. 1072.)

MARCH 15, 2005

*Miscellaneous Order*

No. 04–9131 (04A790). IN RE HALL. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

*Certiorari Denied*

No. 04–9106 (04A787). SLAUGHTER *v.* OKLAHOMA. Ct. Crim. App. Okla. Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied. Certiorari denied. Reported below: 108 P. 3d 1052.

MARCH 17, 2005

*Miscellaneous Order*

No. 04A801. SCHINDLER ET UX., INDIVIDUALLY AND AS NEXT FRIENDS OF SCHIAVO *v.* SCHIAVO, AS GUARDIAN OF SCHIAVO. Dist. Ct. App. Fla., 2d Dist. Application for stay of enforcement of judgment pending the filing and disposition of petition for writ of certiorari, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

MARCH 18, 2005

*Dismissal Under Rule 46*

No. 04–1032. BLACKWELL *v.* BEACON JOURNAL PUBLISHING CO., INC., ET AL. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 389 F. 3d 683.

*Miscellaneous Orders*

No. 04A811. COMMITTEE ON GOVERNMENT REFORM OF THE HOUSE OF REPRESENTATIVES *v.* SCHIAVO ET AL. Sup. Ct. Fla. Application for injunctive relief, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

No. 04–5928. MEDELLIN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. [Certiorari granted, 543 U. S. 1032.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted to be divided as follows: 30 minutes for petitioner; 20 minutes for respondent; and 10 minutes for the United States.

MARCH 21, 2005

*Certiorari Granted—Vacated and Remanded*

No. 03–8987. MENTEER *v.* UNITED STATES. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Shepard* v. *United States*, *ante*, p. 13. Reported below: 350 F. 3d 767.

No. 04–1064. FISH *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Booker*, 543 U. S. 220 (2005). Reported below: 388 F. 3d 284.

No. 04–6848. FARIS *v.* UNITED STATES. C. A. 4th Cir. Reported below: 107 Fed. Appx. 308;

No. 04–8295. PRUITT *v.* UNITED STATES. C. A. 5th Cir. Reported below: 119 Fed. Appx. 629;

No. 04–8479. BUFFINGTON *v.* UNITED STATES. C. A. 6th Cir.;

No. 04–8490. COATES *v.* UNITED STATES. C. A. 4th Cir. Reported below: 113 Fed. Appx. 520;

No. 04–8492. PEREZ *v.* UNITED STATES. C. A. 3d Cir. Reported below: 115 Fed. Appx. 586;

No. 04–8495. BRETON-PICHARDO *v.* UNITED STATES. C. A. 4th Cir. Reported below: 114 Fed. Appx. 577;

No. 04–8507. MARANA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 111 Fed. Appx. 761;

No. 04–8526. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 113 Fed. Appx. 620;

No. 04–8529. BERWICK *v.* UNITED STATES. C. A. 2d Cir. Reported below: 107 Fed. Appx. 253;

No. 04–8537. MACIAS-LUNA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 233;

No. 04–8538. LIZARRAGA-ORDUNO *v.* UNITED STATES. C. A. 10th Cir. Reported below: 118 Fed. Appx. 439;

No. 04–8541. STOKES *v.* UNITED STATES. C. A. 1st Cir. Reported below: 388 F. 3d 21;

No. 04–8542. SATTERFIELD *v.* UNITED STATES. C. A. 4th Cir. Reported below: 114 Fed. Appx. 545;

No. 04–8550. CIFUENTES-CAYCEDO *v.* UNITED STATES. C. A. 5th Cir. Reported below: 111 Fed. Appx. 772;

No. 04–8585. HANNA *v.* UNITED STATES. C. A. 11th Cir. Reported below: 125 Fed. Appx. 270;

No. 04–8589. GUTIERREZ-AGUINIGA *v.* UNITED STATES. C. A. 10th Cir. Reported below: 101 Fed. Appx. 328;

No. 04–8591. WEAKS *v.* UNITED STATES. C. A. D. C. Cir. Reported below: 388 F. 3d 913;

No. 04–8599. RICE *v.* UNITED STATES. C. A. 4th Cir. Reported below: 85 Fed. Appx. 336;

No. 04–8601. MCTIZIC, AKA METIZIC *v.* UNITED STATES. C. A. 5th Cir. Reported below: 111 Fed. Appx. 255;

No. 04–8604. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Reported below: 390 F. 3d 393;

No. 04–8605. MONTALVO-NUNEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 111 Fed. Appx. 779;

No. 04–8619. GARCIA RAMIREZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 116 Fed. Appx. 480;

No. 04–8629. AUSTIN *v.* UNITED STATES. C. A. 5th Cir. Reported below: 111 Fed. Appx. 783;

No. 04–8631. PADILLA, AKA PADDILLA *v.* UNITED STATES. C. A. 11th Cir. Reported below: 127 Fed. Appx. 471;

No. 04–8650. MCCRIMON *v.* UNITED STATES. C. A. 11th Cir. Reported below: 125 Fed. Appx. 977;

No. 04–8652. CARRILLO-BANUELOS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 112 Fed. Appx. 989; and

No. 04–8705. GIGLIO *v.* UNITED STATES. C. A. 11th Cir. Reported below: 112 Fed. Appx. 1. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Booker*, 543 U. S. 220 (2005).

No. 04–6889. KENNEDY *v.* TEXAS BOARD OF PARDONS AND PAROLES ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Wilkinson* v. *Dotson*, *ante*, p. 74. Reported below: 111 Fed. Appx. 219.

No. 04–7702. GONZALEZ *v.* JUSTICES OF THE MUNICIPAL COURT OF BOSTON ET AL. C. A. 1st Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Smith* v. *Massachusetts*, 543 U. S. 462 (2005). Reported below: 382 F. 3d 1.

*Certiorari Dismissed*

No. 04–8218. REED *v.* ARIZONA ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

*Miscellaneous Orders*

No. D–2387. IN RE DISBARMENT OF IFILL. Disbarment entered. [For earlier order herein, see 543 U. S. 1045.]

No. D–2388. IN RE DISBARMENT OF CULVER. Disbarment entered. [For earlier order herein, see 543 U. S. 1045.]

No. D–2391. IN RE DISBARMENT OF YOUNG. Disbarment entered. [For earlier order herein, see 543 U. S. 1045.]

No. D–2392. IN RE DISBARMENT OF WEBBER. Disbarment entered. [For earlier order herein, see 543 U. S. 1045.]

No. D–2393. IN RE DISBARMENT OF FRANKEL. Disbarment entered. [For earlier order herein, see 543 U. S. 1045.]

No. D–2394. IN RE DISBARMENT OF GOODMAN. Disbarment entered. [For earlier order herein, see 543 U. S. 1046.]

No. D–2418. IN RE GEORGE. Donald Elias George, of Akron, Ohio, having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys permitted to the practice of law before this Court. The rule to show cause, issued on February 22, 2005 [543 U. S. 1142], is discharged.

No. 04M58. CURTO *v.* ROTH ET AL.; and

No. 04M59. BRENDA S. *v.* ST. VINCENT'S SERVICES. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 04–7160. IN RE BLEDSOE. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [543 U. S. 1048] denied.

No. 04–7296. RUIZ RIVERA *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [543 U. S. 1048] denied.

No. 04–7297. RUIZ RIVERA *v.* KPMG PEAT MARWICK ET AL. C. A. 1st Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [543 U. S. 1118] denied.

No. 04–7317. CARNOHAN *v.* NEWCOMB. Sup. Ct. Cal. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [543 U. S. 1118] denied.

No. 04–8116. S. C. ET VIR *v.* R. Y. ET UX. Sup. Ct. Miss. Motion of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until April 11, 2005, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 04–1119. IN RE BORELLI; and

No. 04–8807. IN RE WHEELER. Petitions for writs of habeas corpus denied.

*Certiorari Denied*

No. 04–38. MILLER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 150.

No. 04–544. LEWIS, WARDEN, ET AL. *v.* CHIA. C. A. 9th Cir. Certiorari denied. Reported below: 360 F. 3d 997.

No. 04–559. BAYER AG ET AL. *v.* PAUL. C. A. 11th Cir. Certiorari denied.

No. 04–670. ALERU *v.* GONZALES, ATTORNEY GENERAL. C. A. 8th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 62.

No. 04–692. CHANEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 160.

No. 04–716. POWERS ET AL. *v.* HARRIS ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 379 F. 3d 1208.

No. 04–763. BAXTER INTERNATIONAL INC. ET AL. *v.* ASHER ET AL.; and

No. 04–926. BROWN ET AL. *v.* BAXTER INTERNATIONAL INC. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 377 F. 3d 727.

No. 04–784. ALLEN ET AL. *v.* CORRECTIONS CORPORATION OF AMERICA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 380 F. 3d 989.

No. 04–788. FRYE ET AL. *v.* TARWATER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 375 F. 3d 785.

No. 04–793. CAUGHT-ON-BLEU, INC. *v.* ANHEUSER-BUSCH, INC. C. A. 1st Cir. Certiorari denied. Reported below: 105 Fed. Appx. 285.

No. 04–807. SEILS ET AL. *v.* ROCHESTER CITY SCHOOL DISTRICT ET AL.; BLISS *v.* ROCHESTER CITY SCHOOL DISTRICT; MURPHY *v.* ROCHESTER CITY SCHOOL DISTRICT; and COONS *v.* ROCHESTER CITY SCHOOL DISTRICT. C. A. 2d Cir. Certiorari denied. Reported below: 99 Fed. Appx. 350 (first judgment); 100 Fed. Appx. 854 (fourth judgment); 103 Fed. Appx. 421 (second judgment); 106 Fed. Appx. 746 (third judgment).

No. 04–816. PHILIP MORRIS INC. *v.* HENLEY. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 114 Cal. App. 4th 1429, 9 Cal. Rptr. 3d 29.

No. 04–830. FEDERAL KEMPER LIFE ASSURANCE CO. *v.* BERRY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. Ct. App. N. M. Certiorari denied. Reported below: 136 N. M. 454, 99 P. 3d 1166.

No. 04–833. OLD LINE LIFE INSURANCE COMPANY OF AMERICA *v.* ENFIELD, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED. Ct. App. N. M. Certiorari denied. Reported below: 136 N. M. 398, 98 P. 3d 1048.

No. 04–855. DONOHUE ET AL. *v.* HOEY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 340.

No. 04–896. DESMYTHER *v.* BOUCHARD, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 364.

No. 04–912. LAUCK *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 346 Ill. App. 3d 1196, 866 N. E. 2d 720.

No. 04–917. CARR *v.* CITY OF CISCO, TEXAS, ET AL. Ct. App. Tex., 11th Dist. Certiorari denied. Reported below: 161 S. W. 3d 522.

No. 04–918. NADER ET AL. *v.* CONNOR, SECRETARY OF STATE OF TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 388 F. 3d 137.

No. 04–919. PEACH *v.* ULTRAMAR DIAMOND SHAMROCK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 711.

No. 04–920. SILVAS *v.* REMINGTON OIL & GAS CORP. C. A. 5th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 676.

No. 04–930. NWOKE *v.* JONES. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 348 Ill. App. 3d 1084, 868 N. E. 2d 1098.

No. 04–932. MENDONCA *v.* SUPREME JUDICIAL COURT OF MASSACHUSETTS ET AL. C. A. 1st Cir. Certiorari denied.

No. 04–933. TINGLEY ET AL. *v.* CITY OF GRAND RAPIDS, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 510.

No. 04–934. ADAMS *v.* CONTINENTAL AIRLINES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 94 Fed. Appx. 968.

No. 04–938. MILLENDER *v.* ADAMS. C. A. 6th Cir. Certiorari denied. Reported below: 376 F. 3d 520.

No. 04–941. HURDLE *v.* BOARD OF EDUCATION OF THE CITY OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 113 Fed. Appx. 423.

No. 04–942. JOSHI *v.* ST. LUKE'S PRESBYTERIAN-EPISCOPALIAN HOSPITAL, INC., ET AL. Ct. App. Mo. Certiorari denied. Reported below: 142 S. W. 3d 862.

No. 04–945. BRONCO WINE CO. ET AL. *v.* JOLLY, DIRECTOR, CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 33 Cal. 4th 943, 95 P. 3d 422.

No. 04–950. CITY OF MOBILE, ALABAMA *v.* HORNE ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 897 So. 2d 972.

No. 04–953. WABEKE *v.* MULDER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 566.

No. 04–957. BOULANGER *v.* DUNKIN' DONUTS INC. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 442 Mass. 635, 815 N. E. 2d 572.

No. 04–962. MORRIS *v.* TEXAS. Ct. App. Tex., 8th Dist. Certiorari denied.

No. 04–963. MOBILE AREA WATER AND SEWER SYSTEM, BOARD OF WATER AND SEWER COMMISSIONERS OF THE CITY OF MOBILE, ALABAMA *v.* HORNE ET AL. Sup. Ct. Miss. Certiorari denied. Reported below: 897 So. 2d 972.

No. 04–965. GRINE ET AL. *v.* COOMBS, EXECUTOR OF THE ESTATE OF COOMBS, DECEASED, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 98 Fed. Appx. 178.

No. 04–966. BRADSHAW ET AL. *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 152 Wash. 2d 528, 98 P. 3d 1190.

No. 04–968. CHARLOTTE COUNTY, FLORIDA *v.* ARMSTRONG. C. A. 11th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 244.

No. 04–970. RODRIGUEZ *v.* ANSETT AUSTRALIA, LTD., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 383 F. 3d 914.

No. 04–974. SPRINGER *v.* SUPREME COURT OF THE UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 04–988. GRIFFIN ET AL. *v.* ROUPAS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 385 F. 3d 1128.

No. 04–997. CHAMBERLAIN GROUP, INC. *v.* SKYLINK TECHNOLOGIES, INC. C. A. Fed. Cir. Certiorari denied. Reported below: 381 F. 3d 1178.

No. 04–1006. BAKOWSKI *v.* KURIMAI ET AL. C. A. 2d Cir. Certiorari denied.

No. 04–1022. COBURN ET AL. *v.* CIRCUIT COURT OF MISSISSIPPI, WINSTON COUNTY. Sup. Ct. Miss. Certiorari denied.

No. 04–1026. CRISP ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 638.

No. 04–1027. DEARMOND, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF DEARMOND, ET AL. *v.* SOUTHWIRE CO. C. A. 6th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 722.

No. 04–1030. KONAN *v.* VIRGINIA STATE BAR. Sup. Ct. Va. Certiorari denied.

No. 04–1035. RUBIN *v.* PRINGLE, CHAPTER 7 TRUSTEE. C. A. 9th Cir. Certiorari denied. Reported below: 387 F. 3d 1077.

No. 04–1083. STIREWALT *v.* UNITED STATES. Ç. A. Armed Forces. Certiorari denied. Reported below: 60 M. J. 297.

No. 04–1093. O'HARA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–1111. GABALDON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 389 F. 3d 1090.

No. 04–5077. SANTOS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 363 F. 3d 19.

No. 04–5453. SALGADO-RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 603.

No. 04–5858. FRANKLIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 150.

No. 04–6831. MEYER *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVI-

SION. C. A. 5th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 956.

No. 04–7253. KINCADE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 379 F. 3d 813.

No. 04–7293. PUCKETT *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 879 So. 2d 920.

No. 04–7553. JOHNSON *v.* CARROLL, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 369 F. 3d 253.

No. 04–8004. SAMPSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 385 F. 3d 183.

No. 04–8013. HERNANDEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–8036. CHESTER *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–8038. COREY *v.* REICH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 753.

No. 04–8040. DORROUGH *v.* SULLIVAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–8043. DECKER *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 266.

No. 04–8046. CADMAN *v.* JOHANSEN, JUDGE, SEVENTH DISTRICT JUVENILE COURT OF UTAH, ET AL. C. A. 10th Cir. Certiorari denied.

No. 04–8047. DOCKERAY *v.* PRICE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 693.

No. 04–8048. EPPERSON *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 858 A. 2d 960.

No. 04–8050. LEVINE *v.* NEW JERSEY DEPARTMENT OF LAW & PUBLIC SAFETY ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–8053. SIDES *v.* CITY OF CHAMPAIGN, ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 349 Ill. App. 3d 293, 810 N. E. 2d 287.

No. 04–8055. WALKER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 919 So. 2d 1235.

No. 04–8063. ELDER *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied. Reported below: 132 S. W. 3d 20.

No. 04–8066. SOWELL *v.* BRADSHAW, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 372 F. 3d 821.

No. 04–8068. NEGRON *v.* HENDRICKS, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–8072. JOHNSON *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 04–8076. MOXLEY *v.* BENNETT, SUPERINTENDENT, ELMIRA CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–8079. ALEXANDER *v.* GEIER ET AL. C. A. 7th Cir. Certiorari denied.

No. 04–8080. BELL *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 886 So. 2d 739.

No. 04–8081. BRYANT *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 886 So. 2d 251.

No. 04–8087. MULE' *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 888 So. 2d 222.

No. 04–8088. MOORE *v.* MORRIS, HEAD OF OPERATIONS, ATOKA HIGHWAY & MAINTENANCE, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 203.

No. 04–8091. CROSS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–8093. CASSIDY *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied. Reported below: 149 S. W. 3d 712.

No. 04–8095. DUDLEY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 04–8096. ERWIN *v.* SMITH, SHERIFF, SMITH COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 854.

No. 04–8098. SMITH *v.* YARBOROUGH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–8100. MCDERMOTT *v.* MISSOURI DEPARTMENT OF CORRECTIONS. Ct. App. Mo. Certiorari denied. Reported below: 147 S. W. 3d 766.

No. 04–8102. WOLVERTON *v.* OREGON. Ct. App. Ore. Certiorari denied.

No. 04–8103. WILLIAMS *v.* HELLING, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 68.

No. 04–8108. JOHNSON *v.* MCBRIDE, SUPERINTENDENT, MAXIMUM CONTROL FACILITY. C. A. 7th Cir. Certiorari denied. Reported below: 381 F. 3d 587.

No. 04–8112. JOSEY *v.* TEXAS DEPARTMENT OF PUBLIC SAFETY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 9.

No. 04–8121. HOFER *v.* DAIMLERCHRYSLER CORP. Ct. App. Mich. Certiorari denied.

No. 04–8125. FRANKLIN *v.* CITY OF TAMPA, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 252.

No. 04–8126. GADDIS *v.* LOUISIANA. Ct. App. La., 2d Cir. Certiorari denied. Reported below: 839 So. 2d 1258.

No. 04–8127. LEWIS *v.* SMITH, SHERIFF, BELL COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 429.

No. 04–8129. BERTSCH *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–8131. BUGGS *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 884 So. 2d 42.

No. 04–8133. MARTEL *v.* RATELLE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–8134. KING *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 142 S. W. 3d 645.

No. 04–8135. CASTRO CHAVEZ *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–8136. CRANE *v.* SAMPLES ET AL. Ct. App. Ga. Certiorari denied. Reported below: 267 Ga. App. 895, 600 S. E. 2d 624.

No. 04–8137. COLIDA *v.* KYOCERA WIRELESS CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 116 Fed. Appx. 282.

No. 04–8138. DUNN *v.* BOYETTE. C. A. 4th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 295.

No. 04–8140. KAMSAN SUON *v.* CAREY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–8142. HARDY *v.* VASBINDER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–8143. HENDERSON *v.* REDDISH, WARDEN. Super. Ct. Wayne County, Ga. Certiorari denied.

No. 04–8145. HUGHES *v.* HURLEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–8152. WILLIAMS *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 04–8153. WATERS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 04–8154. WILLIAMS *v.* SHERRY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–8158. CRANE *v.* DARNELL ET AL. Ct. App. Ga. Certiorari denied. Reported below: 268 Ga. App. 311, 601 S. E. 2d 726.

No. 04–8161. STRONG *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 825 A. 2d 658.

No. 04–8163. RIVERA *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–8164. LETIZIA *v.* BURGE, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–8168. MYERS *v.* MILLER-STOUT, SUPERINTENDENT, AIRWAY HEIGHTS CORRECTIONS CENTER. C. A. 9th Cir. Certiorari denied. Reported below: 117 Fed. Appx. 542.

No. 04–8172. HICKS *v.* STRAUB, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 377 F. 3d 538.

No. 04–8175. DANIELS *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 859 A. 2d 1008.

No. 04–8176. MS. S. *v.* VASHON ISLAND SCHOOL DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 337 F. 3d 1115.

No. 04–8182. KELLY ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 64 Fed. Appx. 361.

No. 04–8183. GORMAN *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 854 A. 2d 1164.

No. 04–8186. SHAFER *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 04–8188. SEDGWICK *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 109 Fed. Appx. 436.

No. 04–8190. CARTY *v.* PHILLIPS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–8191. ARRIOLA *v.* PLILER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 879.

No. 04–8192. CANNON *v.* MULLIN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 383 F. 3d 1152.

No. 04–8193. ANAGAW *v.* GONZALES, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 926.

No. 04–8194. BROOKS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–8195. BRYANT *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 04–8196. BELTON *v.* KEMPKER ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 17.

No. 04–8199. WILDIN *v.* THOMPSON. C. A. 9th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 845.

No. 04–8200. THINH TRAN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 888 So. 2d 226.

No. 04–8213. LLOYD *v.* HICKMAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 514.

No. 04–8220. SMITH *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 04–8222. NORTON *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 04–8242. OLDHAM *v.* DELAWARE. Sup. Ct. Del. Certiorari denied.

No. 04–8254. J. D. *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 04–8258. PULFORD *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 04–8265. BARBER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 348 Ill. App. 3d 1085, 868 N. E. 2d 1098.

No. 04–8267. AMES *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 886 So. 2d 228.

No. 04–8268. ABBOTT *v.* BLADES, WARDEN. Sup. Ct. Idaho. Certiorari denied.

No. 04–8269. BOLDT *v.* BOLDT. Sup. Ct. Ore. Certiorari denied.

No. 04–8270. ALBERT *v.* MINNEAPOLIS PUBLIC HOUSING AUTHORITY. Sup. Ct. Minn. Certiorari denied.

No. 04–8276. DOMINGUE *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 5th Cir. Certiorari denied. Reported below: 388 F. 3d 462.

No. 04–8280. MCCORD *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 892 So. 2d 1055.

No. 04–8284. LEACH *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 04–8286. WOOTEN *v.* PARKER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 492.

No. 04–8290. BOSCH *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 32 Kan. App. 2d xix, 91 P. 3d 1254.

No. 04–8314. DAGLEY *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 442 Mass. 713, 816 N. E. 2d 527.

No. 04–8329. HULL *v.* CITY OF SANTA FE, NEW MEXICO. C. A. 10th Cir. Certiorari denied. Reported below: 113 Fed. Appx. 301.

No. 04–8335. UNCAPHER *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 04–8338. GILCREAST *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 04–8352. RUCKER *v.* KYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–8361. CHAMBERLAIN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 881 So. 2d 1087.

No. 04–8363. MASSEY *v.* GAMMON, SUPERINTENDENT, MOBERLY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 04–8367. MORALES *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–8370. JONES *v.* CITY OF LOS ANGELES DEPARTMENT OF HOUSING. C. A. 9th Cir. Certiorari denied.

No. 04–8372. JONES *v.* BURGE, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–8376. BAZE *v.* PARKER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 371 F. 3d 310.

No. 04–8378. CUNNINGHAM *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 337 Ore. 528, 99 P. 3d 271.

No. 04–8379. SOTO *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 139 S. W. 3d 827.

No. 04–8385. MOUSSAOUI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 382 F. 3d 453.

No. 04–8390. SALGADO *v.* GARCIA, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 384 F. 3d 769.

No. 04–8391. YOUNG *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 888 So. 2d 625.

No. 04–8408. ROWLAND *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–8410. JEEN YOUNG HAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 04–8416. FISHER *v.* GAMMON, SUPERINTENDENT, MOBERLY CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 04–8417. FARR *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 04–8418. HENRY *v.* GONZALES, ATTORNEY GENERAL, ET AL. C. A. 7th Cir. Certiorari denied.

No. 04–8419. GRIMES *v.* FOWLER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 807.

No. 04–8426. MATTIS *v.* DEPARTMENT OF JUSTICE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 567.

No. 04–8430. NUNEZ SANCHEZ *v.* GARCIA, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–8432. MONIRUZZAMAN *v.* GONZALES, ATTORNEY GENERAL. C. A. 2d Cir. Certiorari denied.

No. 04–8435. DONALDSON *v.* CENTRAL MICHIGAN UNIVERSITY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 15.

No. 04–8436. DONALDSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 37.

No. 04–8443. POTTS *v.* OREGON. C. A. 9th Cir. Certiorari denied.

No. 04–8444. MCGLEACHIE *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 04–8450. STEVENSON *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 814.

No. 04–8466. ROGERS *v.* HELLENBRAND ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 118 Fed. Appx. 80.

No. 04–8467. ROWELL *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 120 Nev. 1280, 131 P. 3d 636.

No. 04–8481. BRYANT *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 883 So. 2d 280.

No. 04–8483. BROWN *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–8500. DURHAM *v.* BRUCE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 117 Fed. Appx. 37.

No. 04–8512. TOMEI *v.* DEPARTMENT OF EDUCATION. C. A. Fed. Cir. Certiorari denied. Reported below: 113 Fed. Appx. 920.

No. 04–8524. SANTANA *v.* NEVADA. Sup. Ct. Nev. Certiorari denied. Reported below: 120 Nev. 1281, 131 P. 3d 637.

No. 04–8532. BROWN *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 111 Fed. Appx. 614.

No. 04–8533. BERGER *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 04–8544. WALKER *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–8560. ROGERS *v.* SUTTON, SUPERINTENDENT, PASQUOTANK CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 113 Fed. Appx. 569.

No. 04–8564. MANLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–8567. ADAMS *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Forsyth County, N. C. Certiorari denied.

No. 04–8575. BRADLEY *v.* SHANNON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FRACKVILLE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–8582. GRAY *v.* POTTER, POSTMASTER GENERAL. C. A. 7th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 891.

No. 04–8583. HUYNH *v.* BOWEN, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 374 F. 3d 546.

No. 04–8584. HUGS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 384 F. 3d 762.

No. 04–8586. HAMMER *v.* TRENDL. C. A. 2d Cir. Certiorari denied.

No. 04–8592. PARCHMENT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–8593. NULL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–8594. NEAL *v.* LAPPIN, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 04–8595. SANCHES MONTES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 105.

No. 04–8597. SAITTA *v.* MARYLAND DEPARTMENT OF HEALTH AND MENTAL HYGIENE. Ct. Sp. App. Md. Certiorari denied. Reported below: 158 Md. App. 721, 728.

No. 04–8600. SANTIAGO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 110 Fed. Appx. 161.

No. 04–8602. MORGAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–8603. JEFFRIES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 490.

No. 04–8607. IACULLO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–8609. IVEY *v.* DEPARTMENT OF THE TREASURY. C. A. Fed. Cir. Certiorari denied. Reported below: 107 Fed. Appx. 918.

No. 04–8616. MCDOUGLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 153.

No. 04–8622. WOODARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 533.

No. 04–8625. REED *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–8627. SEDGWICK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–8634. MARTINEZ-PARAMO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 380 F. 3d 799.

No. 04–8636. CHUNG *v.* JUDICIAL COUNCIL OF CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–8645. DEUTSCH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–8647. PRIDGEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 292.

No. 04–8653. COLEMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 821.

No. 04–8658. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 341.

No. 04–8663. MULLANE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 123 Fed. Appx. 877.

No. 04–8665. ALLEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 04–8668. BOTELLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 118 Fed. Appx. 783.

No. 04–8672. BLACK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 125 Fed. Appx. 976.

No. 04–8683. TALLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 113 Fed. Appx. 543.

No. 04–8691. CARTER *v.* GONZALES, ATTORNEY GENERAL, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 566.

No. 04–8693. CORTEZ MARTIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 582.

No. 04–8699. ARNOLD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 763.

No. 04–8700. ALTSCHUL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 482.

No. 04–8706. TURNER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 389 F. 3d 111.

No. 04–8712. CURTO *v.* CORNELL UNIVERSITY COLLEGE OF VETERINARY MEDICINE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 87 Fed. Appx. 788.

No. 04–8718. ORTIZ-GONZALEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 696.

No. 04–8723. MADDOX *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 388 F. 3d 1356.

No. 04–8727. DAVIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–8731. HARDY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 04–8733. HAZEL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 357.

No. 04–8741. SCHOMAKER *v.* NALLEY, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 104 Fed. Appx. 763.

No. 04–8752. CAMPBELL *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 108 Fed. Appx. 1.

No. 04–8753. SHERRILL *v.* COMMANDANT, UNITED STATES DISCIPLINARY BARRACKS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 118 Fed. Appx. 384.

No. 04–8756. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–8767. VELA-SALINAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 238.

No. 04–8772. LANE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 543.

No. 04–8774. MILLNER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 868 A. 2d 886.

No. 04–8777. EARNEST *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 538.

No. 04–8779. LEVY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 828.

No. 04–8785. BURGIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 388 F. 3d 177.

No. 04–8786. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 334.

No. 04–8828. ANDREWS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 113 Fed. Appx. 524.

No. 04–8829. ANTRIM *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 389 F. 3d 276.

No. 04–386. BELL, WARDEN *v.* QUINTERO. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 368 F. 3d 892.

JUSTICE THOMAS, with whom THE CHIEF JUSTICE joins, dissenting.

In this case, the Court of Appeals for the Sixth Circuit held that respondent Derrick Quintero was entitled to federal habeas

relief from his state-court conviction for escaping from prison. Because the Court of Appeals failed to follow this Court's decision in *Bell* v. *Cone*, 535 U. S. 685 (2002), I would grant the warden's petition for certiorari and reverse.

Respondent was convicted in Kentucky state court of escaping from prison with two other inmates. The jury to which the Commonwealth tried him included seven members who had served on a jury that had convicted one of the other escapees, Billy Hall. Respondent's trial counsel represented Hall at Hall's trial, which was held on October 16, 1989. Final Brief for Petitioner/Appellee in No. 99–6724 (CA6), p. 7.

Respondent was tried almost two months later, on December 11, together with the other escapee, James Blanton. Respondent and Blanton both admitted their factual guilt; their only defense was that the escape was a necessary "choice of evils," because they were in imminent danger of physical harm while in prison. Pet. for Cert. 5. The trial judge rejected that defense as a matter of law and declined to submit it to the jury. Respondent did not object to the composition of the jury on the ground that it contained jurors who had participated in Hall's trial and therefore, as a matter of state law, forfeited any claim of error based on that ground.

Respondent sought federal habeas relief, claiming that the trial had infringed his constitutional right to an impartial jury. Respondent argued that his counsel's failure to object to the composition of the jury was ineffective assistance of counsel, thereby excusing his forfeiture of the jury-bias claim. The Court of Appeals agreed and excused the procedural default, holding that counsel's failure to object constituted *per se* ineffective assistance of counsel under *United States* v. *Cronic*, 466 U. S. 648 (1984). *Quintero* v. *Bell*, 256 F. 3d 409, 413–415 (CA6 2001). *Cronic* established that certain failings of counsel justify a *per se* presumption of ineffectiveness, see 466 U. S., at 658–659, notwithstanding the general rule that to demonstrate ineffectiveness, a defendant must show that his counsel's performance was both deficient and prejudicial, see *Strickland* v. *Washington*, 466 U. S. 668, 687 (1984).

The Court of Appeals did not claim that counsel's failure to object to the composition of the jury fell into one of the three categories of error that *Cronic* recognized. See *Cone*, *supra*, at 695–696 (discussing *Cronic*'s three categories). Instead, it rea-

soned that *Cronic* applied because the biased jury was a "structural error" exempt from harmless-error analysis, depriving the trial of "'its character as a confrontation between adversaries.'" *Quintero*, *supra*, at 415 (quoting *Cronic*, *supra*, at 657). Reaching the merits, the Court of Appeals held that the state-court trial had violated respondent's constitutional right to an impartial jury, and affirmed the District Court's decision to grant respondent a conditional writ of habeas corpus. *Quintero*, *supra*, at 412–413, 416.

We granted the warden's petition for certiorari, vacated the Court of Appeals' judgment, and remanded the case in light of *Bell* v. *Cone*, *supra*. *Bell* v. *Quintero*, 535 U. S. 1109 (2002). In *Cone*, we reversed a Sixth Circuit decision that had misapplied *Cronic*. *Cone* involved a habeas petitioner who had been convicted of capital murder and sentenced to death. At the penalty phase of petitioner's trial, petitioner's lawyer called the jury's attention to mitigating evidence that had been presented to it during the guilt phase of the trial, showing petitioner's disturbed mental state and drug addiction. 535 U. S., at 691. Nevertheless, the Court of Appeals concluded that counsel had failed to subject the case to "'meaningful adversarial testing'" at the penalty phase—one of the three recognized examples of *Cronic* error, see 535 U. S., at 695–696—because counsel had failed to present additional mitigating evidence, and because counsel had waived final argument. *Cone* v. *Bell*, 243 F. 3d 961, 979 (2001) (quoting *Cronic*, *supra*, at 656). We reversed, reasoning:

> "When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete. We said 'if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing.' *Cronic*, *supra*, at 659 (emphasis added). Here, respondent's argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points. For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree but of kind." 535 U. S., at 696–697.

After we vacated and remanded its judgment in light of *Cone*, the Court of Appeals in the decision below again held that re-

spondent's attorney had committed *Cronic* error. It reasoned that "counsel's acquiescence in allowing seven jurors who had convicted [respondent's] co-conspirators to sit in judgment of his case surely amounted to an abandonment of 'meaningful adversarial testing' *throughout* the proceeding," and therefore was *per se* ineffective assistance of counsel under *Cronic*. 368 F. 3d 892, 893 (CA6 2004) (quoting *Cronic, supra*, at 659; emphasis in original). For this reason, the Court of Appeals found the present case distinguishable from *Cone*, once again excused respondent's procedural default, and reinstated its previous opinion and judgment. 368 F. 3d, at 893.

The Court of Appeals committed the same error we corrected in *Cone*. It held that respondent's counsel failed to subject his case to meaningful adversarial testing. Yet our decision in *Cone* makes clear that for a court to "presum[e] prejudice based on an attorney's failure to test the prosecutor's case, . . . the attorney's failure must be complete." 535 U. S., at 697; accord, *Florida* v. *Nixon*, 543 U. S. 175, 190 (2004); *French* v. *Jones*, 332 F. 3d 430, 439 (CA6 2003). Here, counsel's failure was far from complete. Respondent's attorney extensively questioned the veniremen for prior knowledge and bias, put on a necessity defense, cross-examined the Commonwealth's witnesses, made numerous motions and objections, and delivered a closing statement.* As in

*See *Quintero* v. *Bell*, 256 F. 3d 409, 411 (CA6 2001); State Tr. of Evidence 8 (objecting to respondent's shackling); *id.*, at 11–12 (objecting to respondent's prison clothing); *id.*, at 15–16 (moving for recusal of the prosecutor); *id.*, at 18–20 (moving for individual *voir dire* of the veniremen to avoid taint from pretrial publicity); *id.*, at 29–31, 40 (asking veniremen whether they could be impartial, notwithstanding pretrial publicity surrounding the case); *id.*, at 30 (asking that venireman be excused because she expressed bias); *id.*, at 33 (asking if any of the veniremen had seen respondent before); *id.*, at 34–35 (requesting that venireman be excused because she was related to a prosecutor); *id.*, at 36 (moving for a mistrial because many of the veniremen had heard about the escape incident); *id.*, at 37–38 (asking that veniremen be excused because they had prior knowledge of the escape); *id.*, at 39 (asking veniremen if they were related to the prosecutors); *id.*, at 41–42 (moving to dismiss venireman affected by the escape); *id.*, at 43 (asking veniremen if they were related to law enforcement personnel); *id.*, at 51–54, 69–73, 76–78 (cross-examining witnesses); *id.*, at 79, 83–84 (calling respondent to the stand and examining him); *id.*, at 96, 99–100 (calling respondent's codefendant to the stand and examining him); *id.*, at 110–111 (conducting redirect examination of respondent's codefendant); *id.*, at 112–114 (calling a prison medical technician to the stand and examining her); *id.*, at 116 (re-

*Cone*, "respondent's argument is not that his counsel failed to oppose the prosecution throughout the [case] as a whole, but that his counsel failed to do so at specific points"—namely, at the specific point of jury selection. 535 U. S., at 697. The notion that this discrete error amounts to a complete failure of meaningful adversarial testing is flatly inconsistent with *Cone*'s analysis, though it does resemble the reasoning of the lone *Cone* dissenter. See *id.*, at 716–717 (opinion of STEVENS, J.) (concluding that when an error "concern[s] 'points' that encompass all of counsel's fundamental duties at a capital sentencing proceeding . . . counsel *has* failed 'entirely'" (emphasis in original)).

The Court of Appeals' holding also rests on a confusion—the idea that the presence of a structural error, by itself, is necessarily related to counsel's deficient performance and warrants a presumption of prejudice. The *Cronic* presumption is based on the notion that certain "circumstances . . . are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." 466 U. S., at 658. Those exceptional circumstances encompass instances in which counsel's poor performance caused the defendant prejudice, not any prejudicial circumstance whatsoever. See *Cone*, *supra*, at 695–696 (enumerating examples of *Cronic* error, all involving circumstances related to whether counsel's assistance was ineffective). Yet there is no close correlation between counsel's performance and whether a trial was infected with structural error, much less one so close as to justify a presumption that counsel was ineffective. For example, even competent counsel may fail to object to a biased trial judge or to the exclusion of grand jurors on the basis of the defendant's race. The structural nature of these defects, see *Tumey* v. *Ohio*, 273 U. S. 510, 535 (1927); *Vasquez* v. *Hillery*, 474 U. S. 254, 262 (1986), says only that a serious error infected the trial, not that the error resulted from counsel's ineffective assistance.

The Court of Appeals' reasoning equally would apply even if counsel's failure to object to the biased jurors were blameless and the quality of his assistance high. See *Quintero*, 256 F. 3d, at 415. Even a competent defense lawyer may not have known that the jurors had served previously, for example, if the veniremen

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questing jury instruction on necessity defense); *id.*, at 118–125 (closing statement); *id.*, at 131 (moving for partial dismissal of the indictment); *id.*, at 146–147 (closing statement at penalty phase).

were not forthcoming at *voir dire*. It is no answer to say that it is obvious that counsel in this case *should* have objected to the composition of the jury; the whole point of the *Cronic* presumption is to presume ineffectiveness *without* inquiring on a case-by-case, error-by-error basis into the wisdom of counsel's actual performance (and any resulting prejudice) under *Strickland*. The fact that respondent had a potentially biased jury may well be a serious trial error. But it is not an error that warrants the *per se* conclusion that his counsel was constitutionally ineffective.

It is also far from clear on the present record that counsel's failure to object to the biased nature of the jury was blameworthy. The Court of Appeals based its holding that counsel was ineffective on the implicit supposition that he knew that the seven jurors had previously served, yet failed to object to their presence. *Quintero*, *supra*, at 415. That assumption is not clearly correct. Almost two months elapsed between the trial of respondent's coescapee, Billy Hall, and respondent's trial. Respondent's counsel was a public defender, and in the shuffle of a heavy caseload may well have forgotten the names and faces of the seven jurors who had served previously. Moreover, counsel extensively questioned the veniremen about possible bias, asked that veniremen be disqualified because they had prior knowledge of the case, and moved for a mistrial on the ground that the entire jury was tainted by pretrial publicity. See *supra*, at 939–940, n. Counsel's concern with these sources of jury bias is hard to square with the hypothesis that he knew that seven members of respondent's jury had served on Hall's jury, yet ignored such an obvious source of jury bias. In any event, counsel's performance may well have been deficient, but this lingering factual uncertainty illustrates the danger of presuming—over a decade after the fact and based on nothing more than a federal appellate court's reading of the cold record—that counsel's failure to object was *per se* constitutionally ineffective.

* * *

The Court of Appeals' decision is one of three Sixth Circuit judgments that we vacated and remanded in light of *Cone*. See *Quintero*, 535 U. S. 1109; *Mason* v. *Mitchell*, 536 U. S. 901 (2002); *Jones* v. *French*, 535 U. S. 1109 (2002). In all three, the Sixth Circuit reinstated its previous opinion and again ordered the writs granted. See 368 F. 3d, at 893 (case below); *Mitchell* v. *Mason*,

325 F. 3d 732, 742–744 (2003) (again finding *Cronic* error); *French* v. *Jones*, 332 F. 3d, at 436–439 (same). In *Cone* itself, the Sixth Circuit reinstated its order affirming the grant of the writ, albeit on grounds independent of *Cronic*. See *Cone* v. *Bell*, 359 F. 3d 785, 799 (2004). These decisions were all dubious applications of this Court's precedents. See *Bell* v. *Cone*, 543 U. S. 447, 459–460 (2005) *(per curiam)* (summarily reversing); *Mitchell*, 325 F. 3d, at 748–749 (Carr, J., dissenting); Pet. for Cert. in *Jones* v. *French*, O. T. 2003, No. 03–522. The Court's decision to deny the warden's petition in the present case, of course, says nothing about whether the Court of Appeals' reasoning was correct. See, *e. g.*, *Foster* v. *Florida*, 537 U. S. 990 (2002) (opinion of STEVENS, J., respecting denial of certiorari). But in view of this series of questionable applications of our precedent, especially of our first *Cone* opinion, I would correct the Court of Appeals' latest error. I therefore respectfully dissent.

No. 04–787. QUALCHOICE, INC. *v.* ROWLAND. C. A. 6th Cir. Motion of Trover Solutions for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 367 F. 3d 638.

No. 04–828. EVANS ET AL. *v.* STEPHENS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 387 F. 3d 1220.

JUSTICE STEVENS, respecting the denial of certiorari.

On several occasions in the past, I have found it appropriate to emphasize the fact that a denial of certiorari is not a ruling on the merits of any issue raised by the petition.[1] This is a case that raises significant constitutional questions regarding the President's intrasession appointment of Judge William H. Pryor, Jr., to the Court of Appeals for the Eleventh Circuit, which occurred

[1] See, *e. g.*, *Equality Foundation of Greater Cincinnati, Inc.* v. *Cincinnati*, 525 U. S. 943 (1998) (opinion of STEVENS, J., respecting denial of certiorari); *Brown* v. *Texas*, 522 U. S. 940, 942 (1997) (same); *Barber* v. *Tennessee*, 513 U. S. 1184 (1995) (same); cf. *Darr* v. *Burford*, 339 U. S. 200, 227 (1950) (Frankfurter, J., dissenting) ("Nothing is more basic to the functioning of this Court than an understanding that denial of certiorari is occasioned by a variety of reasons which precludes the implication that were the case here the merits would go against the petitioner"); *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, 917–918 (1950) (opinion of Frankfurter, J., respecting denial of certiorari).

during the 11-day President's Day break between February 12 and 23, 2004.[2] However, this is also a case in which, as the Government has urged in its response, there are valid prudential concerns supporting the decision to deny certiorari. Those considerations include the fact that the particular type of appointment in question is "the first such appointment of an Article III judge" in nearly a half century,[3] that petitioners seek review of an interlocutory order,[4] and the fact that the Court of Appeals did "not view the question of the constitutionality of Judge Pryor's appointment as affecting jurisdiction."[5] Moreover, the court's citation to our decision in *Freytag* v. *Commissioner*, 501 U. S. 868 (1991), suggests that it viewed Judge Pryor's participation in the decision of otherwise properly constituted three-judge panels as irrelevant to those panels' power to enter a valid judgment. See 387 F. 3d 1220, 1222, n. 1 (CA11 2004) (en banc).

I agree that there are legitimate prudential reasons for denying certiorari in this somewhat unusual case. That being said, it would be a mistake to assume that our disposition of this petition constitutes a decision on the merits of whether the President has the constitutional authority to fill future Article III vacancies, such as vacancies on this Court, with appointments made absent consent of the Senate during short intrasession "recesses."

No. 04–935. SOUTH CAROLINA *v.* MICHAEL H. Sup. Ct. S. C. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 360 S. C. 540, 602 S. E. 2d 729.

No. 04–937. SOUTH CAROLINA *v.* VON DOHLEN. Sup. Ct. S. C. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 360 S. C. 598, 602 S. E. 2d 738.

No. 04–8638. IN SOO CHUN *v.* BUSH, FORMER PRESIDENT OF THE UNITED STATES, ET AL. C. A. 9th Cir. Certiorari before judgment denied.

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[2] The Court of Appeals, sitting en banc, held that Judge Pryor's appointment was consistent with the Recess Appointments Clause of Article II of the Constitution. See 387 F. 3d 1220 (CA11 2004).

[3] Brief in Opposition 10.

[4] *Id.*, at 6.

[5] 387 F. 3d, at 1222, n. 1 (noting that our decision in *Nguyen* v. *United States*, 539 U. S. 69 (2003), was not a jurisdictional holding).

*Rehearing Denied*

No. 03–9560. HOWELL, AKA COX *v.* MISSISSIPPI, 542 U. S. 936;
No. 04–394. BELL, WARDEN *v.* CONE, 543 U. S. 447;
No. 04–619. WEIL *v.* UNITED STATES, 543 U. S. 1022;
No. 04–655. URBAN *v.* HURLEY, 543 U. S. 1089;
No. 04–671. VANGUILDER *v.* UNITED STATES, 543 U. S. 1055;
No. 04–733. GRAVES *v.* SCHROEDER, CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, ET AL.; and GRAVES *v.* FEESS ET AL., 543 U. S. 1056;
No. 04–5616. IN RE TWILLEY, 543 U. S. 923;
No. 04–6158. CHAVEZ *v.* UNITED STATES, 543 U. S. 1123;
No. 04–6325. WHITE *v.* MORGAN, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY, 543 U. S. 991;
No. 04–6366. DOUGLAS *v.* UNITED STATES, 543 U. S. 1109;
No. 04–6837. SOLESBEE *v.* UNITED STATES, 543 U. S. 1111;
No. 04–6856. IN RE BARKCLAY, 543 U. S. 1048;
No. 04–6876. SANWICK *v.* UTAH, 543 U. S. 1061;
No. 04–6897. WALLACE *v.* PLILER, WARDEN, 543 U. S. 1062;
No. 04–6902. HILL *v.* MIAMI-DADE COUNTY MAYOR ET AL., 543 U. S. 1062;
No. 04–6917. IN RE MEASE, 543 U. S. 1048;
No. 04–6918. IN RE BARKCLAY, 543 U. S. 1048;
No. 04–6926. TOWNSEND *v.* LAFLER, WARDEN, 543 U. S. 1062;
No. 04–6954. IN RE BARKCLAY, 543 U. S. 1048;
No. 04–7023. IN RE BARKCLAY, 543 U. S. 1048;
No. 04–7024. IN RE BARKCLAY, 543 U. S. 1048;
No. 04–7085. SCHRADER *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY, 543 U. S. 1066;
No. 04–7152. VALENTINE *v.* CARRIER CORP., 543 U. S. 1069;
No. 04–7163. IN RE BARKCLAY, 543 U. S. 1048;
No. 04–7200. IN RE BARKCLAY, 543 U. S. 1048;
No. 04–7214. IN RE BARKCLAY, 543 U. S. 1088;
No. 04–7215. IN RE BARKCLAY, 543 U. S. 1088;
No. 04–7216. IN RE BARKCLAY, 543 U. S. 1088;
No. 04–7218. IN RE BARKCLAY, 543 U. S. 1088;
No. 04–7275. IN RE FISH, 543 U. S. 1088;
No. 04–7406. BEGORDIS *v.* MINNESOTA, 543 U. S. 1126;
No. 04–7412. WILLIAMS *v.* WYNDER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL., 543 U. S. 1127;
No. 04–7505. WILLIAMS *v.* UNITED STATES, 543 U. S. 1078;

No. 04–7526. BANSAL *v.* IMMIGRATION AND NATURALIZATION SERVICE ET AL., 543 U. S. 1127;

No. 04–7529. DIAZ *v.* UNITED STATES, 543 U. S. 1079;

No. 04–7559. CASSANO *v.* UNGER, SUPERINTENDENT, LIVINGSTON CORRECTIONAL FACILITY, 543 U. S. 1094;

No. 04–7581. IN RE FIGUEROA, 543 U. S. 1048;

No. 04–7696. HADDAD *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 543 U. S. 1128;

No. 04–7776. AJAN *v.* UNITED STATES, 543 U. S. 1129;

No. 04–7777. STAFFORD *v.* UNITED STATES, 543 U. S. 1129;

No. 04–7811. ESCOVAR-MADRID, AKA VALAZGUEZ *v.* UNITED STATES, 543 U. S. 1130;

No. 04–7819. MARTINEZ-CARRILLO *v.* UNITED STATES, 543 U. S. 1130; and

No. 04–7838. DAVIS *v.* UNITED STATES, 543 U. S. 1131. Petitions for rehearing denied.

No. 03–10346. WALKER, AKA SMITH *v.* UNITED STATES, 542 U. S. 914. Motion for leave to file petition for rehearing denied.

MARCH 24, 2005

*Miscellaneous Order*

No. 04A825. SCHIAVO EX REL. SCHINDLER ET UX. *v.* SCHIAVO ET AL. C. A. 11th Cir. Application for stay of enforcement of judgment pending the filing and disposition of a petition for writ of certiorari, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

MARCH 28, 2005

*Certiorari Granted—Vacated and Remanded*

No. 03–1503. BROWN, WARDEN *v.* BELMONTES. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Brown* v. *Payton*, *ante*, p. 133. Reported below: 350 F. 3d 861.

No. 04–711. KOONIN *v.* UNITED STATES. C. A. 9th Cir. Reported below: 361 F. 3d 1250;

No. 04–858. GRASSO *v.* UNITED STATES. C. A. 3d Cir. Reported below: 381 F. 3d 160; and

No. 04–1086. ROBINSON *v.* UNITED STATES. C. A. 6th Cir. Reported below: 116 Fed. Appx. 646. Certiorari granted, judg-

ments vacated, and cases remanded for further consideration in light of *United States* v. *Booker*, 543 U. S. 220 (2005).

No. 04–7231. BILLINGSLEA *v.* UNITED STATES. C. A. 11th Cir.;

No. 04–8657. JOYNER *v.* UNITED STATES. C. A. 6th Cir. Reported below: 105 Fed. Appx. 811;

No. 04–8659. SCOTT *v.* UNITED STATES. C. A. 5th Cir. Reported below: 112 Fed. Appx. 965;

No. 04–8667. ALCORN *v.* UNITED STATES. C. A. 9th Cir. Reported below: 116 Fed. Appx. 119;

No. 04–8670. ALVARADO *v.* UNITED STATES. C. A. 5th Cir. Reported below: 111 Fed. Appx. 311;

No. 04–8678. NAVA RIVAS *v.* UNITED STATES. C. A. 9th Cir. Reported below: 111 Fed. Appx. 505;

No. 04–8686. VAZQUEZ-MOLINA *v.* UNITED STATES. C. A. 1st Cir. Reported below: 389 F. 3d 54;

No. 04–8709. MCGUIRE *v.* UNITED STATES. C. A. 1st Cir. Reported below: 389 F. 3d 225;

No. 04–8713. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 112 Fed. Appx. 991;

No. 04–8714. HELTON *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 687;

No. 04–8715. GOMEZ-MORALES *v.* UNITED STATES. C. A. 5th Cir. Reported below: 117 Fed. Appx. 334;

No. 04–8722. LOWRY *v.* UNITED STATES. C. A. 4th Cir. Reported below: 116 Fed. Appx. 446;

No. 04–8724. MADRAZO-CONSTANTE *v.* UNITED STATES. C. A. 5th Cir. Reported below: 111 Fed. Appx. 283;

No. 04–8726. BAUTISTA-SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 116 Fed. Appx. 512;

No. 04–8728. CHAPPELL *v.* UNITED STATES. C. A. 5th Cir. Reported below: 113 Fed. Appx. 643;

No. 04–8732. HOLLYWOOD *v.* UNITED STATES. C. A. 5th Cir. Reported below: 117 Fed. Appx. 905;

No. 04–8744. VITELA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 112 Fed. Appx. 991;

No. 04–8751. LARSON *v.* UNITED STATES. C. A. 9th Cir. Reported below: 122 Fed. Appx. 301;

No. 04–8761. BROWN *v.* UNITED STATES. C. A. 5th Cir. Reported below: 101 Fed. Appx. 522;

No. 04–8768. TRASVINA ALVAREZ *v.* UNITED STATES. C. A. 11th Cir. Reported below: 116 Fed. Appx. 863;

No. 04–8775. ELVE *v.* UNITED STATES. C. A. 6th Cir. Reported below: 115 Fed. Appx. 310; and

No. 04–8881. HICKS *v.* UNITED STATES. C. A. 6th Cir. Reported below: 110 Fed. Appx. 600. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Booker*, 543 U. S. 220 (2005).

*Miscellaneous Orders*

No. 04M60. D'AGOSTINO *v.* VER-A-FAST. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 04–8205. HARVEY *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* [543 U. S. 1138] denied.

No. 04–1173. IN RE CAUSEY; and

No. 04–9003. IN RE JONES. Petitions for writs of habeas corpus denied.

No. 04–8260. IN RE BELL-OUTLAW. Petition for writ of mandamus and/or prohibition denied.

*Certiorari Granted*

No. 04–980. BROWN, WARDEN *v.* SANDERS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Questions 1 and 3 presented by the petition. Reported below: 373 F. 3d 1054.

*Certiorari Denied*

No. 03–10261. LEGRAND *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 864 So. 2d 89.

No. 04–280. KEBEDE *v.* GONZALES, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 454.

No. 04–693. FRANKLIN SAVINGS CORP. ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 97 Fed. Appx. 331.

No. 04–694. CHOMIC, PERSONAL REPRESENTATIVE OF THE ESTATE OF GORJUP, DECEASED *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 377 F. 3d 607.

No. 04–703. WASDEN, ATTORNEY GENERAL OF IDAHO, ET AL. *v.* PLANNED PARENTHOOD OF IDAHO, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 376 F. 3d 908.

No. 04–714. TRIPLE A FIRE PROTECTION, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 11th Cir. Certiorari denied.

No. 04–806. ARKANSAS *v.* JOLLY. Sup. Ct. Ark. Certiorari denied. Reported below: 358 Ark. 180, 189 S. W. 3d 40.

No. 04–822. AMMEX, INC. *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 367 F. 3d 530.

No. 04–835. AG ROUTE SEVEN PARTNERSHIP ET AL. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 104 Fed. Appx. 184.

No. 04–837. TARVER *v.* BO-MAC CONTRACTORS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 384 F. 3d 180.

No. 04–859. SPEKEN ET UX. *v.* MOORE. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 6 App. Div. 3d 198, 773 N. Y. S. 2d 880.

No. 04–860. AMMEX, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 384 F. 3d 1368.

No. 04–972. SPIRKO *v.* BRADSHAW, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 368 F. 3d 603.

No. 04–976. PPG INDUSTRIES, INC. *v.* NELSON, DBA JAMESTOWN GLASS SERVICE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 385 F. 3d 350.

No. 04–977. PAM CAPITAL FUNDING, L. P., ET AL. *v.* NATIONAL GYPSUM CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 113 Fed. Appx. 29.

No. 04–981. TORO CO. *v.* WHITE CONSOLIDATED INDUSTRIES, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 383 F. 3d 1326.

No. 04–982. SELLENS ET UX. *v.* GROTH ET AL. Ct. App. Kan. Certiorari denied. Reported below: 32 Kan. App. 2d xxx, 94 P. 3d 737.

No. 04–984. BRIARPATCH LTD., L. P., ET AL. *v.* PHOENIX PICTURES, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 373 F. 3d 296.

No. 04–990. GENTHE *v.* QUEBECOR WORLD LINCOLN, INC. C. A. 8th Cir. Certiorari denied. Reported below: 383 F. 3d 713.

No. 04–993. HUNTINGTON RESTAURANTS GROUP, INC., ET AL. *v.* FRANCHISE HOLDING II, LLC. C. A. 9th Cir. Certiorari denied. Reported below: 375 F. 3d 922.

No. 04–999. VIRGINIA DEPARTMENT OF STATE POLICE *v.* WASHINGTON POST ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 386 F. 3d 567.

No. 04–1002. WILDER *v.* VILLAGE OF AMITYVILLE, NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 111 Fed. Appx. 635.

No. 04–1017. UNITED STATES EX REL. DINGLE ET AL. *v.* BIOPORT CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 388 F. 3d 209.

No. 04–1051. POWERS *v.* LEIS, SHERIFF, HAMILTON COUNTY, OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 382 F. 3d 642.

No. 04–1076. DEYERBERG *v.* WOODWARD ET AL. Ct. Sp. App. Md. Certiorari denied.

No. 04–1078. ROBINSON ET AL. *v.* TEXAS AUTOMOBILE DEALERS ASSN. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 387 F. 3d 416.

No. 04–1082. MANN *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 271 Conn. 300, 857 A. 2d 329.

No. 04–1090. PRATT *v.* WASHINGTON DEPARTMENT OF LABOR AND INDUSTRIES. Ct. App. Wash. Certiorari denied.

No. 04–1097. BRAVEHEART *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 85 Fed. Appx. 771.

No. 04–1109. HOOK *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 661.

No. 04–1122. CYRUS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 714.

No. 04–1125. KLINE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 562.

No. 04–7326. BILLIOT *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 385.

No. 04–7361. ANDREWS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 383 F. 3d 374.

No. 04–7452. YORK *v.* TENNESSEE BOARD OF PROBATION AND PAROLE. Ct. App. Tenn. Certiorari denied.

No. 04–7459. BERRY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 882 So. 2d 157.

No. 04–7521. SANCHEZ-PARRA ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 895.

No. 04–7609. WYATT *v.* OREGON. Sup. Ct. Ore. Certiorari denied.

No. 04–7718. ALLEY *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 04–7775. DELGADO-GARCIA ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 374 F. 3d 1337.

No. 04–7807. ESCAMILLA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 143 S. W. 3d 814.

No. 04–8181. LOTT *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 98 P. 3d 318.

No. 04–8219. SCALES *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 964.

No. 04–8221. SCHERRER *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 04–8225. MESA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–8230. OBI *v.* TEXAS (two judgments). Ct. Crim. App. Tex. Certiorari denied.

No. 04–8234. WILLIAMS *v.* THOMSON CORP. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 383 F. 3d 789.

No. 04–8235. O'NEAL *v.* KRAMER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–8236. MITCHAM *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 643.

No. 04–8239. MONEY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–8261. AMKHANITSKY *v.* CTC REAL ESTATE SERVICES. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 04–8264. ADAMS *v.* MOORE, SUPERINTENDENT, NORTHEAST CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 04–8266. BARRON-BACA *v.* SHOEMAKER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 118 Fed. Appx. 374.

No. 04–8281. MALAN *v.* MALAN. Ct. App. Ind. Certiorari denied. Reported below: 804 N. E. 2d 1283.

No. 04–8282. SHELTON *v.* WILSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 794.

No. 04–8283. SOUTH *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–8287. WOLFE *v.* MAHLE; WOLFE *v.* SACRAMENTO COUNTY, CALIFORNIA, ET AL.; and WOLFE *v.* SACRAMENTO COUNTY BAR ASSN. ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 04–8297. OLIVEIRA *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 890 So. 2d 1115.

No. 04–8302. AHMED *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 103 Ohio St. 3d 27, 813 N. E. 2d 637.

No. 04–8317. CONKLIN *v.* SCHOFIELD, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 366 F. 3d 1191.

No. 04–8330. HIRACHETA *v.* LOCKYER, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 937.

No. 04–8331. FLEMING *v.* CITY OF DETROIT, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 492.

No. 04–8340. TURAY *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 153 Wash. 2d 44, 101 P. 3d 854.

No. 04–8341. VERA *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 04–8342. THOMAS *v.* TEXAS. Ct. App. Tex., 12th Dist. Certiorari denied.

No. 04–8343. VALDIVIA *v.* OROSCO ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 251.

No. 04–8344. TURNER *v.* RUNNELS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–8345. WILKIN *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL FACILITY, ET AL. C. A. 8th Cir. Certiorari denied.

No. 04–8346. TILLMAN *v.* SCHOFIELD, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 04–8349. WILSON *v.* SUPERIOR COURT OF CALIFORNIA, PIMA COUNTY, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 285.

No. 04–8353. PARKER *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–8358. BERRY *v.* KLEM, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT MAHANOY. C. A. 3d Cir. Certiorari denied.

No. 04–8364. MURRAY *v.* THOMPSON, WARDEN. C. A. D. C. Cir. Certiorari denied.

No. 04–8368. MARLOW *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 34 Cal. 4th 131, 96 P. 3d 126.

No. 04–8371. CORDERO *v.* GORDON, TRUSTEE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 271.

No. 04–8373. FOSTER *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 04–8392. MURPHY *v.* CAREY, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 648.

No. 04–8394. PITTMAN *v.* KYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–8395. JACKSON *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 349 Ill. App. 3d 1044, —— N. E. 2d ——.

No. 04–8397. VORA *v.* CROWDER. C. A. 3d Cir. Certiorari denied. Reported below: 95 Fed. Appx. 463.

No. 04–8399. WILLIAMS *v.* BRADSHAW, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–8405. BURDSAL *v.* FARWELL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–8407. CLARK *v.* CORRECTIONS CORPORATION OF AMERICA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 113 Fed. Appx. 65.

No. 04–8411. FOTI *v.* OHIO. Ct. App. Ohio, Lake County. Certiorari denied.

No. 04–8438. COUCH *v.* HERNANDEZ, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–8453. CYARS *v.* HOFBAUER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 383 F. 3d 485.

No. 04–8487. WILLOUGHBY *v.* CASON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–8491. CARROLL *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–8515. CHRISTOPHER *v.* ESTEP, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 04–8549. ROLLINS *v.* SMITH ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 106 Fed. Appx. 513.

No. 04–8556. ARTIGLIO *v.* MARSHALL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–8590. HELM *v.* ORTIZ, EXECUTIVE DIRECTOR, COLORADO DEPARTMENT OF CORRECTIONS, ET AL. C. A. 10th Cir. Certiorari denied.

No. 04–8598. RAY *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 858.

No. 04–8617. WALKER *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–8654. MATTHEWS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 339.

No. 04–8704. JIMENEZ *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–8735. FARRAR *v.* BELLEQUE, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 811.

No. 04–8770. WILLIAMS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 04–8792. NYHUIS *v.* DEWALT, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 112 Fed. Appx. 866.

No. 04–8793. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–8796. RAPP *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–8811. TORRES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 113 Fed. Appx. 844.

No. 04–8813. PONDER *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 892 So. 2d 486.

No. 04–8819. CLARK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–8826. AHMED *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 848 A. 2d 616.

No. 04–8832. SCOTT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–8833. MARTIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 333 F. 3d 819.

No. 04–8835. MAYNIE *v.* OLSON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 04–8852. POLLENDER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 389 F. 3d 869.

No. 04–8855. SOBERANIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 113 Fed. Appx. 778.

No. 04–8862. COUCH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 348.

No. 04–8863. YOUNG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 125 Fed. Appx. 981.

No. 04–8868. HENLEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 726.

No. 04–8879. GONZALEZ-QUINTANA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 806.

No. 04–8891. CARRASCO-MATEO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 389 F. 3d 239.

No. 04–8894. MACKIE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 117 Fed. Appx. 860.

No. 04–8902. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 389 F. 3d 944.

No. 04–8905. RUPLEY ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 106 Fed. Appx. 590.

No. 04–8908. ALEXANDER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–8911. ARMOUR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 678.

No. 04–8917. OUTLER *v.* ANDERSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 284.

No. 04–8939. MOES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–686. GOMEZ *v.* AMOCO OIL CO. C. A. 11th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 379 F. 3d 1266.

No. 04–856. CITY OF EVANSTON, ILLINOIS *v.* FRANKLIN. C. A. 7th Cir. Motion of International Municipal Lawyers Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 384 F. 3d 838.

No. 04–979. TROY PUBLISHING CO., INC., ET AL. *v.* NORTON ET AL. Sup. Ct. Pa. Motion of Associated Press et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 580 Pa. 212, 860 A. 2d 48.

*Rehearing Denied*

No. 04–640. 1690 COBB L. L. C., DBA WATERPIPE WORLD, ET AL. *v.* CITY OF MARIETTA, GEORGIA, ET AL., 543 U. S. 1054;

No. 04–691. THOMPSON *v.* NATIONAL RAILROAD PASSENGER CORPORATION, 543 U. S. 1121;

No. 04–5943. HUBBARD *v.* UNITED STATES, 543 U. S. 1122;

No. 04–5976. MILLER *v.* UNITED STATES, 543 U. S. 1122;

No. 04–7139. CEASAR *v.* UNITED SERVICES AUTOMOBILE ASSN. ET AL., 543 U. S. 1068;

No. 04–7255. NIMMONS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 543 U. S. 1092;

No. 04–7336. GREEN *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, 543 U. S. 1124;

No. 04–7339. IVES *v.* OKLAHOMA, 543 U. S. 1125;
No. 04–7372. LEWIS *v.* UNITED STATES, 543 U. S. 1075;
No. 04–7623. BERT *v.* SNOW, SECRETARY OF THE TREASURY, ET AL., 543 U. S. 1094; and
No. 04–7649. SPRINGMEIER *v.* UNITED STATES, 543 U. S. 1094. Petitions for rehearing denied.

No. 03–6841. ENIGWE *v.* UNITED STATES, 540 U. S. 1024. Motion for leave to file petition for rehearing denied.

MARCH 30, 2005

*Miscellaneous Order*

No. 04A844. SCHIAVO EX REL. SCHINDLER ET UX. *v.* SCHIAVO ET AL. C. A. 11th Cir. Application for stay of enforcement of judgment pending the filing and disposition of a petition for writ of certiorari, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

APRIL 4, 2005

*Certiorari Granted—Vacated and Remanded*

No. 03–6245. THOMPSON *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Reported below: 320 F. 3d 1228; and
No. 03–7339. AKINS *v.* KENNEY, WARDEN. C. A. 8th Cir. Reported below: 341 F. 3d 681. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Rhines* v. *Weber*, *ante*, p. 269.

No. 04–1. BLAISDELL *v.* CITY OF ROCHESTER, NEW HAMPSHIRE. C. A. 1st Cir.; and
No. 04–745. HOLLOWAY *v.* ARKANSAS STATE BOARD OF ARCHITECTS ET AL. C. A. 8th Cir. Reported below: 103 Fed. Appx. 76. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Exxon Mobil Corp.* v. *Saudi Basic Industries Corp.*, *ante*, p. 280.

No. 04–955. KAPL, INC., ET AL. *v.* MEACHAM ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Smith* v. *City of Jackson*, *ante*, p. 228. Reported below: 381 F. 3d 56.

No. 04–1073. BASHIR *v.* UNITED STATES. C. A. 11th Cir. Reported below: 116 Fed. Appx. 241;

No. 04–1116. WAGNER *v.* UNITED STATES. C. A. 2d Cir. Reported below: 103 Fed. Appx. 422; and

No. 04–1154. GORE *v.* UNITED STATES. C. A. 4th Cir. Reported below: 102 Fed. Appx. 292. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Booker*, 543 U. S. 220 (2005).

No. 04–7913. MITCHELL *v.* UNITED STATES. C. A. 6th Cir. Reported below: 96 Fed. Appx. 994;

No. 04–8632. PINARGOTE-RAMIREZ *v.* UNITED STATES. C. A. 11th Cir. Reported below: 116 Fed. Appx. 246;

No. 04–8794. SERRANO-PINERO *v.* UNITED STATES. C. A. 11th Cir. Reported below: 125 Fed. Appx. 978;

No. 04–8812. MILLER *v.* UNITED STATES. C. A. 3d Cir. Reported below: 374 F. 3d 206;

No. 04–8814. ALCANTARA *v.* UNITED STATES. C. A. 11th Cir. Reported below: 125 Fed. Appx. 976;

No. 04–8817. BEASLEY *v.* UNITED STATES. C. A. 11th Cir. Reported below: 125 Fed. Appx. 976;

No. 04–8834. KAETHER *v.* UNITED STATES. C. A. 5th Cir. Reported below: 117 Fed. Appx. 914;

No. 04–8836. MAZYCK *v.* UNITED STATES. C. A. 4th Cir. Reported below: 111 Fed. Appx. 683;

No. 04–8839. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Reported below: 114 Fed. Appx. 627;

No. 04–8870. HIGGINBOTHAM *v.* UNITED STATES. C. A. 5th Cir. Reported below: 113 Fed. Appx. 641;

No. 04–8871. HORNE *v.* UNITED STATES. C. A. 5th Cir. Reported below: 117 Fed. Appx. 327;

No. 04–8887. MOORE *v.* UNITED STATES. C. A. 5th Cir. Reported below: 114 Fed. Appx. 153;

No. 04–8893. LOZANO-MORALES *v.* UNITED STATES. C. A. 10th Cir. Reported below: 116 Fed. Appx. 236; and

No. 04–9021. MALIK, AKA KHARA *v.* UNITED STATES. C. A. 4th Cir. Reported below: 112 Fed. Appx. 894. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Booker*, 543 U. S. 220 (2005).

*Miscellaneous Orders*

No. 04M61. WEAVER *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 03–1230. AMERICAN TRUCKING ASSNS., INC., ET AL. *v.* MICHIGAN PUBLIC SERVICE COMMISSION ET AL.; and

No. 03–1234. MID-CON FREIGHT SYSTEMS, INC., ET AL. *v.* MICHIGAN PUBLIC SERVICE COMMISSION ET AL. Ct. App. Mich. [Certiorari granted, 543 U. S. 1086 and 1096.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* granted. Motion of petitioners to deconsolidate the cases or, in the alternative, for an enlargement of time for oral argument denied. Motions for divided argument granted to be divided as follows: 15 minutes for petitioners in No. 03–1230; 10 minutes for petitioners in No. 03–1234; 25 minutes for respondents; and 10 minutes for United States.

No. 03–1237. MERCK KGAA *v.* INTEGRA LIFESCIENCES I, LTD., ET AL. C. A. Fed. Cir. [Certiorari granted, 543 U. S. 1041.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 03–1693. MCCREARY COUNTY, KENTUCKY, ET AL. *v.* AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY ET AL. C. A. 6th Cir. [Certiorari granted, 543 U. S. 924.] Motion of petitioners for leave to file a supplemental brief after argument granted.

No. 04–169. GRAHAM COUNTY SOIL & WATER CONSERVATION DISTRICT ET AL. *v.* UNITED STATES EX REL. WILSON. C. A. 4th Cir. [Certiorari granted, 543 U. S. 1042.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 04–514. BELL, WARDEN *v.* THOMPSON. C. A. 6th Cir. [Certiorari granted, 543 U. S. 1042.] Motion of respondent to allow Matthew M. Shors to argue *pro hac vice* granted.

No. 04–563. MAYLE, WARDEN *v.* FELIX. C. A. 9th Cir. [Certiorari granted, 543 U. S. 1042.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 04–603. GRABLE & SONS METAL PRODUCTS, INC. *v.* DARUE ENGINEERING & MANUFACTURING. C. A. 6th Cir. [Certiorari granted, 543 U. S. 1042.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of Jerome Milulski et ux. for leave to participate in oral argument as *amici curiae* and for divided argument denied.

No. 04–9147. IN RE MCQUIRTER. Petition for writ of habeas corpus denied.

No. 04–1014. IN RE LEONICHEV ET AL.;
No. 04–1016. IN RE SCHLAGEL; and
No. 04–8449. IN RE CARY. Petitions for writs of mandamus denied.

No. 04–8633. IN RE NIMMONS. Petition for writ of prohibition denied.

*Certiorari Granted*

No. 04–885. CENTRAL VIRGINIA COMMUNITY COLLEGE ET AL. *v.* KATZ, LIQUIDATING SUPERVISOR FOR WALLACE'S BOOKSTORES, INC. C. A. 6th Cir. Certiorari granted. Reported below: 106 Fed. Appx. 341.

*Certiorari Denied*

No. 03–1628. GEORGE MASON UNIVERSITY *v.* LITMAN. C. A. 4th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 41.

No. 04–451. DEARING ET AL. *v.* TEXAS PARKS AND WILDLIFE DEPARTMENT ET AL. Ct. App. Tex., 10th Dist. Certiorari denied. Reported below: 150 S. W. 3d 452.

No. 04–491. DICKERSON *v.* BATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 699.

No. 04–571. GORECKI *v.* CARLSON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 374 F. 3d 461.

No. 04–723. STEVEDORING SERVICES OF AMERICA ET AL. *v.* PRICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 382 F. 3d 878.

No. 04–741. CULBERTSON *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 11th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 251.

No. 04–870. HALL ET AL. *v.* VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 385 F. 3d 421.

No. 04–873. PHILADELPHIA HOUSING AUTHORITY *v.* WILLIAMS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 380 F. 3d 751.

No. 04–874. SMITH *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 04–875. PINCAY ET AL. *v.* ANDREWS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 389 F. 3d 853.

No. 04–883. MCDOWELL ET UX. *v.* PROVIDENCE HEALTH PLAN; and

No. 04–1044. PROVIDENCE HEALTH PLAN *v.* MCDOWELL ET UX. C. A. 9th Cir. Certiorari denied. Reported below: 385 F. 3d 1168.

No. 04–910. CLARETT *v.* NATIONAL FOOTBALL LEAGUE. C. A. 2d Cir. Certiorari denied. Reported below: 369 F. 3d 124.

No. 04–991. ROSSER *v.* DICKENSON, CONSERVATOR FOR ROBINSON; and

No. 04–1005. DICKENSON, CONSERVATOR FOR ROBINSON *v.* CARDIAC AND THORACIC SURGERY OF EASTERN TENNESSEE, P. C. C. A. 6th Cir. Certiorari denied. Reported below: 388 F. 3d 976.

No. 04–996. CLARK *v.* REDLAND INSURANCE CO. C. A. 11th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 249.

No. 04–1001. TURCHYN ET UX. *v.* NAKONACHNY ET AL. Ct. App. Ohio, Cuyahoga County. Certiorari denied. Reported below: 157 Ohio App. 3d 284, 811 N. E. 2d 119.

No. 04–1018. DLX, INC. *v.* KENTUCKY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 381 F. 3d 511.

No. 04–1029. CHAMBERLAIN *v.* COURT OF APPEALS OF TEXAS, NINTH DISTRICT, JEFFERSON COUNTY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 386.

No. 04–1031. AUSTIN *v.* DOWNS, RACHLIN & MARTIN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 114 Fed. Appx. 21.

No. 04–1037. WILSON *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 04–1039. RANDALL INDUSTRIES, INC., ET AL. *v.* PEASE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 386 F. 3d 819.

No. 04–1040. JONES *v.* ROCKDALE COUNTY, GEORGIA. C. A. 11th Cir. Certiorari denied. Reported below: 120 Fed. Appx. 786.

No. 04–1043. REPUBLIC OF CONGO ET AL. *v.* AF-CAP, INC. C. A. 5th Cir. Certiorari denied. Reported below: 383 F. 3d 361 and 389 F. 3d 503.

No. 04–1046. TOWNSHIP OF UPPER MORELAND, PENNSYLVANIA *v.* NORTHWOOD CONSTRUCTION CO. Sup. Ct. Pa. Certiorari denied. Reported below: 579 Pa. 463, 856 A. 2d 789.

No. 04–1063. FERGUSON *v.* TOWNSHIP OF HAMBURG, MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 04–1069. SINNOTT ET UX. *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 163 N. C. App. 268, 593 S. E. 2d 439.

No. 04–1075. ESENWAH *v.* GONZALES, ATTORNEY GENERAL. C. A. 8th Cir. Certiorari denied. Reported below: 378 F. 3d 763.

No. 04–1087. SANDERS *v.* VINE, EXECUTRIX OF THE ESTATE OF SANDERS. Ct. App. Tenn. Certiorari denied.

No. 04–1105. ERGONOME INC. ET AL. *v.* COMPAQ COMPUTER CORP. C. A. 5th Cir. Certiorari denied. Reported below: 387 F. 3d 403.

No. 04–1117. COHN *v.* BOARD OF PROFESSIONAL RESPONSIBILITY OF THE SUPREME COURT OF TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 151 S. W. 3d 473.

No. 04–1142. BLEDSOE ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 384 F. 3d 1232.

No. 04–1158. MORELLI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–1176. WASHBURN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 383 F. 3d 638.

No. 04–7073. BROCK *v.* WILSON, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY. C. A. 5th Cir. Certiorari denied.

No. 04–7286. SACK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 379 F. 3d 1177.

No. 04–7357. JACKSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 381 F. 3d 984.

No. 04–7421. LOUNSBURY *v.* BELLEQUE, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 374 F. 3d 785.

No. 04–7820. KLAHN *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 96 P. 3d 472.

No. 04–7824. ROBERTS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 381 F. 3d 491.

No. 04–7860. BARNES *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 561.

No. 04–7901. CASH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 378 F. 3d 745.

No. 04–7928. CARTER *v.* MEADOWGREEN ASSOCIATES. Sup. Ct. Va. Certiorari denied. Reported below: 268 Va. 215, 597 S. E. 2d 82.

No. 04–8412. HARRIS *v.* UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT. C. A. 6th Cir. Certiorari denied.

No. 04–8415. FREMONDE *v.* CITY OF NEW YORK, NEW YORK, ET AL. Ct. App. N. Y. Certiorari denied.

No. 04–8420. FELDER *v.* FISCHER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–8423. HEADRICK *v.* LEHMAN, DIRECTOR, WASHINGTON DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 04–8424. GREER *v.* HAMLET, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–8437. COLEMAN *v.* GIULIANI ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 109 Fed. Appx. 478.

No. 04–8439. CHRISTMAS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 349 Ill. App. 3d 1035, —— N. E. 2d ——.

No. 04–8440. TRUJILLO *v.* FARWELL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–8446. KRZYKOWSKI *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 04–8447. MAKIDON *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 04–8448. CRENSHAW *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 04–8454. COOPER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 04–8456. JENNINGS *v.* JACKSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–8458. MACKINTRUSH *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 04–8461. DAVIS *v.* FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 04–8462. MONTOYA *v.* FINN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–8463. PEREZ *v.* WYNDER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–8464. WILSON *v.* HINSLEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 04–8468. REED *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 04–8469. BISHOP *v.* PORTER ET AL. C. A. 2d Cir. Certiorari denied.

No. 04–8470. BUTLER *v.* MBNA TECHNOLOGY, INC. C. A. 5th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 230.

No. 04–8471. APPLEWHITE *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 04–8473. BARNES *v.* ZON, SUPERINTENDENT, WENDE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–8475. KELLEY *v.* WILKINSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL. C. A. 6th Cir. Certiorari denied.

No. 04–8477. MORALES *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 04–8480. ALLEN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 04–8484. BROWN *v.* GIURBINO, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–8485. WILLIAMS *v.* JONES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 117 Fed. Appx. 406.

No. 04–8486. WALLACE *v.* YWCA OF CHEMUNG COUNTY ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 8 App. Div. 3d 912, 778 N. Y. S. 2d 728.

No. 04–8493. WILLIAMS *v.* FINN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 828.

No. 04–8494. PAGNOTTI *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 821 So. 2d 466.

No. 04–8497. DELEON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–8498. CARY *v.* SUPREME COURT OF VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 04–8499. DANIEL *v.* STABLER ET AL. C. A. 6th Cir. Certiorari denied.

No. 04–8501. ROBERSON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–8504. LEACH *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 148 S. W. 3d 42.

No. 04–8508. BELTRAN *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 970.

No. 04–8511. TREECE *v.* ORLEANS PARISH CITY GOVERNMENT JUDICIAL BRANCH ET AL. C. A. 5th Cir. Certiorari denied.

No. 04–8513. MIDDLEBROOKS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 8 App. Div. 3d 1133, 778 N. Y. S. 2d 737.

No. 04–8514. CARDWELL *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 04–8534. MUONG *v.* RUNNELS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 304.

No. 04–8559. TOLE *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 883 So. 2d 805.

No. 04–8641. BECKER *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 887 So. 2d 355.

No. 04–8644. COLIDA *v.* SANYO NORTH AMERICA CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 118 Fed. Appx. 501.

No. 04–8676. BABINEAUX *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 04–8698. BURTCHETT *v.* IDAHO. C. A. 9th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 835.

No. 04–8749. LESLIE *v.* ABBOTT, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 117 Fed. Appx. 72.

No. 04–8760. BROWN *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 99 P. 3d 489.

No. 04–8790. O'NEILL *v.* RICHLAND COUNTY BOARD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 745.

No. 04–8851. MANNING *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 885 So. 2d 1044.

No. 04–8873. GARCIA-PLANCARTE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 846.

No. 04–8877. GALEANA-FLORES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 795.

No. 04–8909. YOUNG *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA. C. A. 11th Cir. Certiorari denied.

No. 04–8947. WALLEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 388 F. 3d 161.

No. 04–8954. RIVERA *v.* FEDERAL BUREAU OF PRISONS ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–8957. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 131.

No. 04–8958. CANPAZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 247.

No. 04–8961. ELSESSER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 860.

No. 04–8963. AYALA-MERCADO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 121 Fed. Appx. 176.

No. 04–8966. BRUZON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–8971. GARCIA ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 118 Fed. Appx. 690.

No. 04–8983. MAYO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 394 F. 3d 1271.

No. 04–8993. ESPARZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 117 Fed. Appx. 352.

No. 04–9002. JOHNSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 119 Fed. Appx. 319.

No. 04–9004. MOREJON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 125 Fed. Appx. 975.

No. 04–9005. MONTGOMERY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 390 F. 3d 1013.

No. 04–9007. MAIREL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 340.

No. 04–9014. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–9015. WINGO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 76 Fed. Appx. 30.

No. 04–9024. BYRD ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 360.

No. 04–9027. ADAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 04–9032. BELTZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 385 F. 3d 1158.

No. 04–9034. WRIGHT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 392 F. 3d 1269.

No. 04–576. BELLEQUE, SUPERINTENDENT, OREGON STATE PENITENTIARY *v.* LOUNSBURY. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 374 F. 3d 785.

No. 04–746. KEMPTON, DIRECTOR, CALIFORNIA DEPARTMENT OF TRANSPORTATION *v.* MALDONADO. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 370 F. 3d 945.

No. 04–899. ATTICA CENTRAL SCHOOLS *v.* J. S., BY HIS PARENT AND NATURAL GUARDIAN, N. S., ET AL. C. A. 2d Cir. Motion of National School Boards Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 386 F. 3d 107.

No. 04–1011. FREEMAN *v.* DUKE POWER CO. ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 114 Fed. Appx. 526.

No. 04–1107. FOCUS MEDIA, INC. *v.* NATIONAL BROADCASTING CO., INC., ET AL. C. A. 9th Cir. Motion of Latino Coalition for

leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 378 F. 3d 916.

No. 04–1150. HAMRICK *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari before judgment denied.

*Rehearing Denied*

No. 04–672. SANK *v.* CITY UNIVERSITY OF NEW YORK ET AL., 543 U. S. 1120;

No. 04–738. CALLAN *v.* BUSH, PRESIDENT OF THE UNITED STATES, 543 U. S. 1056;

No. 04–7229. PARSONS *v.* PRICE, WARDEN, 543 U. S. 1071;

No. 04–7309. FULLER *v.* UNITED STATES, 543 U. S. 1073;

No. 04–7378. IN RE NIMMONS, 543 U. S. 1119;

No. 04–7403. ROBLYER *v.* PENNSYLVANIA DEPARTMENT OF CORRECTIONS, 543 U. S. 1126;

No. 04–7666. SMITH *v.* UNITED STATES, 543 U. S. 1094; and

No. 04–8008. CONYERS *v.* MERIT SYSTEMS PROTECTION BOARD, 543 U. S. 1171. Petitions for rehearing denied.

No. 03–7700. STUMPF *v.* ALASKA ET AL., 540 U. S. 1187. Motion for leave to file petition for rehearing denied.

APRIL 15, 2005

*Miscellaneous Orders*

No. 04A891. LONGWORTH *v.* OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. JUSTICE STEVENS would grant the application for stay of execution.

No. 03–10198. HALBERT *v.* MICHIGAN. Ct. App. Mich. [Certiorari granted, 543 U. S. 1042.] Motion of Louisiana et al. for leave to participate in oral argument as *amici curiae* and for divided argument granted.

No. 04–6432. GONZALEZ *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. [Certiorari granted, 543 U. S. 1086.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

APRIL 18, 2005

*Certiorari Granted—Vacated and Remanded*

No. 03–9629. RIVERS *v.* UNITED STATES. C. A. 11th Cir. Reported below: 91 Fed. Appx. 655;

No. 03–10354. RODRIGUEZ *v.* UNITED STATES. C. A. 11th Cir.; and

No. 04–7335. GRIFFIN *v.* UNITED STATES. C. A. 11th Cir. Reported below: 99 Fed. Appx. 878. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Johnson* v. *United States*, *ante*, p. 295.

No. 04–1164. SALADINO *v.* UNITED STATES. C. A. 7th Cir. Reported below: 119 Fed. Appx. 10; and

No. 04–1188. WREN *v.* UNITED STATES. C. A. 11th Cir. Reported below: 126 Fed. Appx. 462. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Booker*, 543 U. S. 220 (2005).

No. 04–8692. PRITCHETT *v.* UNITED STATES. C. A. 11th Cir. Reported below: 125 Fed. Appx. 976;

No. 04–8720. BANKS *v.* UNITED STATES. C. A. 11th Cir. Reported below: 125 Fed. Appx. 977;

No. 04–8898. ALCANTARA *v.* UNITED STATES. C. A. 6th Cir. Reported below: 116 Fed. Appx. 693;

No. 04–8903. RICHARDSON *v.* UNITED STATES. C. A. 5th Cir. Reported below: 117 Fed. Appx. 931;

No. 04–8916. STEVENS *v.* UNITED STATES. C. A. 11th Cir. Reported below: 127 Fed. Appx. 472;

No. 04–8923. RAMOS-RUIZ *v.* UNITED STATES. C. A. 9th Cir. Reported below: 114 Fed. Appx. 351;

No. 04–8927. GOMEZ-TRUJILLO *v.* UNITED STATES. C. A. 5th Cir. Reported below: 107 Fed. Appx. 406;

No. 04–8937. PACHECO *v.* UNITED STATES. C. A. 1st Cir. Reported below: 388 F. 3d 1;

No. 04–8945. SANCHEZ-CRUZ *v.* UNITED STATES. C. A. 10th Cir. Reported below: 392 F. 3d 1196;

No. 04–8960. CAULK *v.* UNITED STATES. C. A. 9th Cir. Reported below: 116 Fed. Appx. 143;

No. 04–8967. SAMORA-SANCHEZ *v.* UNITED STATES. C. A. 10th Cir. Reported below: 122 Fed. Appx. 909;

No. 04–8972. GAUDELLI *v.* UNITED STATES. C. A. 3d Cir. Reported below: 116 Fed. Appx. 363;

No. 04–8976. WEST *v.* UNITED STATES. C. A. 5th Cir. Reported below: 114 Fed. Appx. 159;

No. 04–8979. DECKARD *v.* UNITED STATES. C. A. 5th Cir. Reported below: 117 Fed. Appx. 350;

No. 04–8986. BYRD *v.* UNITED STATES. C. A. 4th Cir. Reported below: 117 Fed. Appx. 859;

No. 04–8998. MORALES *v.* UNITED STATES. C. A. 1st Cir.;

No. 04–9011. WATSON *v.* UNITED STATES. C. A. 8th Cir. Reported below: 390 F. 3d 577;

No. 04–9013. VARELA-MEDINA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 117 Fed. Appx. 960;

No. 04–9029. PATTERSON *v.* UNITED STATES. C. A. 6th Cir.;

No. 04–9035. NIEVES-BOGADO *v.* UNITED STATES. C. A. 11th Cir. Reported below: 126 Fed. Appx. 463;

No. 04–9037. CLARK *v.* UNITED STATES. C. A. 6th Cir. Reported below: 117 Fed. Appx. 430;

No. 04–9060. RISBY *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 694;

No. 04–9063. HUERTA-VARGAS *v.* UNITED STATES. C. A. 9th Cir. Reported below: 117 Fed. Appx. 578;

No. 04–9082. CONSTANT *v.* UNITED STATES. C. A. 3d Cir. Reported below: 117 Fed. Appx. 225;

No. 04–9095. ROBINSON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Reported below: 390 F. 3d 833;

No. 04–9113. PORTES HERRERA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 117 Fed. Appx. 335;

No. 04–9114. FIELDS *v.* UNITED STATES. C. A. 4th Cir. Reported below: 111 Fed. Appx. 148;

No. 04–9117. WEST *v.* UNITED STATES. C. A. 5th Cir. Reported below: 117 Fed. Appx. 340;

No. 04–9122. CLOUTIER *v.* UNITED STATES. C. A. 1st Cir.;

No. 04–9132. CRAIG *v.* UNITED STATES. C. A. 5th Cir. Reported below: 118 Fed. Appx. 786;

No. 04–9133. CRUZ-AYON, AKA AGUINAGA-CEJA *v.* UNITED STATES. C. A. 9th Cir. Reported below: 117 Fed. Appx. 577; and

No. 04–9142. JONES *v.* UNITED STATES. C. A. 10th Cir. Reported below: 390 F. 3d 1291. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judg-

ments vacated, and cases remanded for further consideration in light of *United States* v. *Booker*, 543 U. S. 220 (2005).

*Certiorari Dismissed*

No. 04–8525. REED *v.* ARIZONA. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

*Miscellaneous Orders*

No. 04A695 (04–8680). TORRES *v.* MOON ET AL. C. A. 9th Cir. Application for stay, addressed to JUSTICE BREYER and referred to the Court, denied.

No. 04M48. CLARK *v.* MCLEOD. Renewed motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 04M62. DOWNS *v.* SOUTH CAROLINA. Motion for leave to proceed *in forma pauperis* without affidavit of indigency executed by petitioner denied.

No. 04M63. JANNEH *v.* MANPOWER INCORPORATED OF NEW YORK ET AL.;

No. 04M64. WATTS *v.* FLORIDA DEPARTMENT OF STATE;

No. 04M65. WANSLEY *v.* WILSON, SUPERINTENDENT, MISSISSIPPI STATE PENITENTIARY, ET AL.; and

No. 04M66. CALDERON *v.* FISCHER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 04–1049. CARPENTERS HEALTH AND WELFARE TRUST FOR SOUTHERN CALIFORNIA *v.* VONDERHARR ET AL. C. A. 9th Cir. The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 04–8614. STEPHANATOS *v.* NEW JERSEY ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis*

denied. Petitioner is allowed until May 9, 2005, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 04–9394. IN RE DAVENPORT. Petition for writ of habeas corpus denied.

No. 04–1079. IN RE WALL;
No. 04–8531. IN RE ABSALON;
No. 04–8640. IN RE VELEZ;
No. 04–8736. IN RE GRANT;
No. 04–8950. IN RE SPARKMAN;
No. 04–9046. IN RE MORRIS;
No. 04–9079. IN RE GRIMSLEY;
No. 04–9174. IN RE BURMAN; and
No. 04–9230. IN RE RILEY. Petitions for writs of mandamus denied.

No. 04–8623. IN RE DARDEN. Petition for writ of mandamus and/or prohibition denied.

*Certiorari Granted*

No. 04–373. MARYLAND *v.* BLAKE. Ct. App. Md. Certiorari granted. Reported below: 381 Md. 218, 849 A. 2d 410.

No. 04–1067. GEORGIA *v.* RANDOLPH. Sup. Ct. Ga. Certiorari granted. Reported below: 278 Ga. 614, 604 S. E. 2d 835.

No. 04–1084. GONZALES, ATTORNEY GENERAL, ET AL. *v.* O CENTRO ESPIRITA BENEFICENTE UNIAO DO VEGETAL ET AL. C. A. 10th Cir. Certiorari granted. Reported below: 389 F. 3d 973.

*Certiorari Denied*

No. 04–530. NAGY *v.* FMC BUTNER. C. A. 4th Cir. Certiorari denied. Reported below: 376 F. 3d 252.

No. 04–731. EASTERN SHOSHONE TRIBE OF THE WIND RIVER RESERVATION ET AL. *v.* UNITED STATES; and
No. 04–929. UNITED STATES *v.* EASTERN SHOSHONE TRIBE OF THE WIND RIVER RESERVATION ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 364 F. 3d 1339.

No. 04–803. SHENANDOAH ET AL. *v.* HALBRITTER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 366 F. 3d 89.

No. 04–809. NORFOLK DREDGING CO., INC. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 375 F. 3d 1106.

No. 04–869. NISSAN MOTOR CO., LTD., ET AL. *v.* NISSAN COMPUTER CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 378 F. 3d 1002.

No. 04–901. BENTON *v.* CAMECO CORP. C. A. 10th Cir. Certiorari denied. Reported below: 375 F. 3d 1070.

No. 04–916. HARTFORD STEAM BOILER INSPECTION & INSURANCE CO. *v.* UNDERWRITERS AT LLOYD'S & COMPANIES COLLECTIVE ET AL. Sup. Ct. Conn. Certiorari denied. Reported below: 271 Conn. 474, 857 A. 2d 893.

No. 04–939. MCGUIRE ET AL. *v.* REILLY, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 386 F. 3d 45.

No. 04–948. PATEL *v.* GONZALES, ATTORNEY GENERAL. C. A. 7th Cir. Certiorari denied. Reported below: 378 F. 3d 610.

No. 04–949. MCMELLON ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 387 F. 3d 329.

No. 04–952. CHOLLA READY MIX, INC. *v.* MENDEZ, SECRETARY, ARIZONA DEPARTMENT OF TRANSPORTATION, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 382 F. 3d 969.

No. 04–985. BURNETT ET AL. *v.* POTTS ET AL. Ct. App. Tenn. Certiorari denied. Reported below: 154 S. W. 3d 582.

No. 04–1028. CALIFORNIA EX REL. LOCKYER, ATTORNEY GENERAL OF CALIFORNIA *v.* DYNEGY, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 375 F. 3d 831 and 387 F. 3d 966.

No. 04–1042. KOLEV *v.* PRESCOTT ET AL. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 04–1048. ENLOW *v.* SALEM-KEIZER YELLOW CAB CO., INC. C. A. 9th Cir. Certiorari denied. Reported below: 389 F. 3d 802.

No. 04–1050. DICKHAUS ET AL. *v.* CHAMPION. C. A. 6th Cir. Certiorari denied. Reported below: 380 F. 3d 893.

No. 04–1053. GOLDBLATT *v.* A&W INDUSTRIES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 765.

No. 04–1059. MONROE *v.* BOOKER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–1060. MULTNOMAH COUNTY, OREGON, ET AL. *v.* ALPHA ENERGY SAVERS, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 381 F. 3d 917.

No. 04–1061. PHILLIPS ET AL. *v.* BOWLES ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 04–1062. RUSHING *v.* BOARD OF SUPERVISORS OF THE UNIVERSITY OF LOUISIANA SYSTEM (SOUTHEASTERN LOUISIANA UNIVERSITY). Ct. App. La., 1st Cir. Certiorari denied. Reported below: 874 So. 2d 432.

No. 04–1065. INTERCONTINENTAL ELECTRONICS, S. P. A. *v.* AMERICAN KEYBOARD PRODUCTS, INC., ET AL. Ct. App. Mich. Certiorari denied.

No. 04–1068. BARTH *v.* TOWN OF SANFORD, MAINE, ET AL. C. A. 1st Cir. Certiorari denied.

No. 04–1070. WEI YE ET AL. *v.* JIANG ZEMIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 383 F. 3d 620.

No. 04–1071. WALKER INTERNATIONAL HOLDINGS LTD. *v.* REPUBLIC OF CONGO ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 395 F. 3d 229.

No. 04–1072. ABRAMS ET AL. *v.* SOCIETE NATIONALE DES CHEMINS DE FER FRANCAIS. C. A. 2d Cir. Certiorari denied. Reported below: 389 F. 3d 61.

No. 04–1074. TERRITORY OF GUAM ET AL. *v.* PACIFICARE HEALTH INSURANCE COMPANY OF MICRONESIA, INC., DBA PACIFICARE ASIA PACIFIC. Sup. Ct. Guam. Certiorari denied.

No. 04–1077. RAVEN ET VIR *v.* COUNTRYWIDE HOME LOANS, INC., ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–1080. NWOKE *v.* PALMER. C. A. 7th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 761.

No. 04–1081. CROSBY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED *v.* BOWATER INCORPORATED RETIREMENT PLAN FOR SALARIED EMPLOYEES OF GREAT NORTHERN PAPER INC. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 382 F. 3d 587.

No. 04–1085. DRINKWATER *v.* PARKER, MCCAY & CRISCUOLO. Super. Ct. N. J., App. Div. Certiorari denied.

No. 04–1088. SILVA ET UX. *v.* GONZALES, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 04–1089. ROSE *v.* LEBOVIDGE, MASSACHUSETTS COMMISSIONER OF REVENUE. C. A. 1st Cir. Certiorari denied. Reported below: 110 Fed. Appx. 136.

No. 04–1091. AMAECHI *v.* UNIVERSITY OF KENTUCKY, COLLEGE OF EDUCATION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 118 Fed. Appx. 32.

No. 04–1092. S. E. W. FRIEL ET AL. *v.* MARYLAND STATE ROADS COMMISSION ET AL. Ct. Sp. App. Md. Certiorari denied. Reported below: 158 Md. App. 722, 729.

No. 04–1096. SAUDI *v.* ACOMARIT MARITIMES SERVICES, S. A. C. A. 3d Cir. Certiorari denied. Reported below: 114 Fed. Appx. 449.

No. 04–1098. JOU *v.* FIRST INSURANCE COMPANY OF HAWAII, LTD. Sup. Ct. Haw. Certiorari denied. Reported below: 106 Haw. 38, 100 P. 3d 969.

No. 04–1099. STAVROPOULOS *v.* FIRESTONE ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 361 F. 3d 610.

No. 04–1100. CUVILLIER *v.* ROCKDALE COUNTY, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 390 F. 3d 1336.

No. 04–1101. ZURLA *v.* CITY OF DAYTONA BEACH, FLORIDA, ET AL. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 876 So. 2d 34.

No. 04–1102. BERRIOCHOA LOPEZ ET AL. *v.* CLINTON, FORMER PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 04–1104. DEMUS *v.* SAN DIEGO COUNTY, CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 327.

No. 04–1118. KANZ *v.* FRANK, SECRETARY, WISCONSIN DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 04–1129. ROMANIUK *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied.

No. 04–1132. LIMAGRAIN GENETICS CORP. *v.* MIDWEST OILSEEDS, INC. C. A. 8th Cir. Certiorari denied. Reported below: 387 F. 3d 705.

No. 04–1133. LONG *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 884 So. 2d 1176.

No. 04–1159. CAMARA ET AL. *v.* GONZALES, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 110 Fed. Appx. 262.

No. 04–1160. CHAPMAN CHILDREN'S TRUST II *v.* POTTER, POSTMASTER GENERAL. C. A. Fed. Cir. Certiorari denied. Reported below: 110 Fed. Appx. 122.

No. 04–1165. BEVAN *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 891 So. 2d 553.

No. 04–1172. BOLIVARIAN REPUBLIC OF VENEZUELA *v.* ELDER OFFSHORE LEASING, INC. C. A. 5th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 541.

No. 04–1174. MALBRAIN ET AL. *v.* WASHINGTON STATE DEPARTMENT OF AGRICULTURE. Ct. App. Wash. Certiorari denied. Reported below: 120 Wash. App. 737, 86 P. 3d 222.

No. 04–1187. VIDEO MANAGEMENT, INC., DBA C&C VIDEO *v.* CITY OF CHARLESTON BOARD OF ZONING APPEALS ET AL. Sup. Ct. S. C. Certiorari denied.

No. 04–1190. KOBOLD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 118 Fed. Appx. 638.

No. 04–1195. GAHR *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 9th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 890.

No. 04–1200. BOARD OF COUNTY COMMISSIONERS OF EL PASO COUNTY, COLORADO, ET AL. *v.* SHOOK ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 386 F. 3d 963.

No. 04–1201. CALDWELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 178.

No. 04–1204. UNITED STATES EX REL. GRAVES ET AL. *v.* ITT EDUCATIONAL SERVICES, INC., ET AL.; and UNITED STATES EX REL. BOWMAN *v.* EDUCATION AMERICA, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 296 (first judgment); 116 Fed. Appx. 531 (second judgment).

No. 04–1217. LEE *v.* TOLSON, SECRETARY, NORTH CAROLINA DEPARTMENT OF REVENUE. Ct. App. N. C. Certiorari denied. Reported below: 166 N. C. App. 256, 601 S. E. 2d 316.

No. 04–1228. WALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 389 F. 3d 457.

No. 04–1254. MOSES *v.* UNITED STATES. C. A. Armed Forces. Certiorari denied. Reported below: 60 M. J. 429.

No. 04–1261. RONALD MORAN CADILLAC, INC. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 385 F. 3d 1230 and 392 F. 3d 1006.

No. 04–1262. SHALASH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 269.

No. 04–1265. HEDAITHY ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 392 F. 3d 580.

No. 04–1272. PIONEER COMMERCIAL FUNDING CORP. *v.* CORESTATES BANK, N. A. Sup. Ct. Pa. Certiorari denied. Reported below: 579 Pa. 275, 855 A. 2d 818.

No. 04–7415. WILLIAMS *v.* COTTON, SUPERINTENDENT, PENDLETON CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 04–7489. QUEEN *v.* PURSER. C. A. 5th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 659.

No. 04–7698. GUZEK *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 336 Ore. 424, 86 P. 3d 1106.

No. 04–7802. MACK *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 346 Ill. App. 3d 1176, 866 N. E. 2d 712.

No. 04–7854. TSABBAR *v.* 17 EAST 89TH STREET TENANTS, INC. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 6 App. Div. 3d 309, 775 N. Y. S. 2d 142.

No. 04–7988. HERNANDEZ *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 278 Kan. ix, 99 P. 3d 132.

No. 04–8028. HARGRAVE-THOMAS *v.* YUKINS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 374 F. 3d 383.

No. 04–8034. OSTER *v.* SUTTON ET AL. Sup. Ct. N. H. Certiorari denied.

No. 04–8064. CONNER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 369 F. 3d 682.

No. 04–8078. BABINEAUX *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 202.

No. 04–8084. ALRUBIAY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 347 Ill. App. 3d 1104, 867 N. E. 2d 117.

No. 04–8105. ZAVREL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 384 F. 3d 130.

No. 04–8107. LENTZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 383 F. 3d 191.

No. 04–8159. SALLEY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–8197. ANDREW *v.* LINCOLN PARK HOUSING COMMISSION. Ct. App. Mich. Certiorari denied.

No. 04–8503. HALL *v.* OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS. Sup. Ct. S. C. Certiorari denied. Reported below: 360 S. C. 353, 601 S. E. 2d 335.

No. 04–8506. CAPERTON *v.* WITHROW, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–8516. DAVIS *v.* WALKER, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 04–8517. COX *v.* BASA, BATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–8518. CONTRERAS *v.* CALDERON, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–8519. MCCOY, AKA MASON *v.* CHRONES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–8520. CARRILLO *v.* CHRONES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–8521. LONG *v.* EARLY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–8527. WALKER *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 04–8528. JORDAN *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 349 Ill. App. 3d 1041, — N. E. 2d —.

No. 04–8535. PARNELL *v.* BROWN, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–8540. MUTHANA *v.* HOFBAUER, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 04–8545. WATFORD *v.* KANKAKEE POLICE DEPARTMENT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 118 Fed. Appx. 77.

No. 04–8547. PAYTON *v.* FISCHER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–8548. SANAI *v.* SANAI. Ct. App. Wash. Certiorari denied. Reported below: 119 Wash. App. 1053.

No. 04–8551. DEPACE *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 442 Mass. 739, 816 N. E. 2d 1215.

No. 04–8552. WALLS *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 860 A. 2d 812.

No. 04–8553. BROWN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 890 So. 2d 901.

No. 04–8554. ALLEN *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 04–8558. TRUJILLO *v.* ARCE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 668.

No. 04–8561. SIRACUSA *v.* POLK, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 339.

No. 04–8565. MARSH *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 849 So. 2d 1178.

No. 04–8568. BLACKMAN *v.* LEWIS ET AL. C. A. 7th Cir. Certiorari denied.

No. 04–8570. BRYANT *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 04–8572. THORNTON *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 783.

No. 04–8573. WATT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 04–8577. ELMAN *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 877 So. 2d 782.

No. 04–8578. CORBIN *v.* BLADEN COUNTY CHILD SUPPORT AGENCY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 758.

No. 04–8579. MORGAN *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–8580. MILLER *v.* BULLARD, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–8581. FITZGERALD *v.* MCCORMICK RANCH PROPERTY OWNERS' ASSN. INC. ET AL. Ct. App. Ariz. Certiorari denied.

No. 04–8587. HOWELL *v.* BROWN. C. A. 9th Cir. Certiorari denied.

No. 04–8588. HUNT *v.* PAUL ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 127 Fed. Appx. 473.

No. 04–8596. SHAW *v.* HARRIS, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 499.

No. 04–8608. GENTRY *v.* BUTLER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 105 Fed. Appx. 939.

No. 04–8610. FAME *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 04–8612. HINNANT *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied.

No. 04–8613. SLAGLE *v.* BAGLEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–8615. RATCLIFF *v.* POLK COUNTY TITLE, INC., ET AL. Ct. App. Tex., 9th Dist. Certiorari denied.

No. 04–8618. RUTHERFORD *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 385 F. 3d 1300.

No. 04–8620. WILLIAMS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 892 So. 2d 1015.

No. 04–8621. WILCOX *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 04–8626. ROSE *v.* THOMAS ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–8628. BROWN *v.* FINZEL ET AL. Ct. App. D. C. Certiorari denied. Reported below: 861 A. 2d 38.

No. 04–8630. ALDRIDGE *v.* KENTUCKY. Ct. App. Ky. Certiorari denied.

No. 04–8635. MARTIN *v.* JACKSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–8637. ELLIOTT *v.* MORGAN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 345.

No. 04–8642. BAIRD *v.* DAVIS, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied. Reported below: 388 F. 3d 1110.

No. 04–8643. COLIDA *v.* QUALCOMM INC. C. A. Fed. Cir. Certiorari denied.

No. 04–8646. CHARLES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–8648. OGUAJU *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 378 F. 3d 1115 and 386 F. 3d 273.

No. 04–8649. POWELL *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 04–8651. PRICE *v.* REID, SUPERINTENDENT, CENTENNIAL CORRECTIONAL FACILITY, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 118 Fed. Appx. 376.

No. 04–8655. JAFFER *v.* NATIONAL CAUCUS & CENTER ON BLACK AGED, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 107.

No. 04–8656. LODGE *v.* CANDELARIA, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 110.

No. 04–8661. MITCHELL *v.* LAFLER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 118 Fed. Appx. 24.

No. 04–8662. NASH *v.* WILKINSON, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 04–8666. ALVARADO *v.* SMALL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 997.

No. 04–8669. BURSON *v.* GREER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 04–8671. BARTON *v.* HATCHER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–8673. BURRELL *v.* ANDERSON COUNTY CRIMINAL COURT ET AL. C. A. 6th Cir. Certiorari denied.

No. 04–8674. BILLUPS *v.* BENNETT ET AL. C. A. 4th Cir. Certiorari denied.

No. 04–8675. BROWN *v.* TRINITY INDUSTRIAL. C. A. 5th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 898.

No. 04–8677. SMITH *v.* FISCHER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 117 Fed. Appx. 779.

No. 04–8679. WRIGHT *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 04–8680. TORRES *v.* MOON ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–8681. VALDIVIA *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–8682. TAPIA-ORTIZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 79 Fed. Appx. 465.

No. 04–8684. YEATS *v.* SANDOVAL, ATTORNEY GENERAL OF NEVADA. C. A. 9th Cir. Certiorari denied.

No. 04–8685. WADE *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 04–8687. COOPER *v.* JOHNSON, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 112 Fed. Appx. 864.

No. 04–8688. CADOGAN *v.* RENICO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–8689. CARTER *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 04–8690. EBERHART *v.* MITCHELL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–8694. RODRIGUEZ *v.* CASTRO, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 865.

No. 04–8695. WILLIAMS *v.* BRANCH BANKING & TRUST CO. ET AL. Sup. Ct. Va. Certiorari denied.

No. 04–8696. ZHANG *v.* APEX HOME & BUSINESS RENTALS, INC. Cir. Ct. Jefferson County, W. Va. Certiorari denied.

No. 04–8697. SHORTER *v.* OHIO. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 04–8701. HOWELL *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 151 S. W. 3d 450.

No. 04–8703. CORNELIUS *v.* CORNELIUS. Ct. App. Ga. Certiorari denied.

No. 04–8707. BELL *v.* TRUE, WARDEN. Sup. Ct. Va. Certiorari denied.

No. 04–8708. MURPHY *v.* VALADEZ, ACTING WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 113 Fed. Appx. 825.

No. 04–8710. BALAJ ET UX. *v.* GONZALES, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 629.

No. 04–8711. NALLS *v.* OHIO. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 04–8716. HENDERSON *v.* CASTRO, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–8717. HOLMES *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 346 Ill. App. 3d 1193, 866 N. E. 2d 719.

No. 04–8721. CHRISTENSEN *v.* STAMMEN. C. A. 7th Cir. Certiorari denied.

No. 04–8725. ACOSTA *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 04–8729. HARTWELL *v.* BAZZLE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 810.

No. 04–8737. HALL *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 04–8739. GARY *v.* HINKLE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 356.

No. 04–8740. GLASS *v.* KENNEY, WARDEN. Sup. Ct. Neb. Certiorari denied. Reported below: 268 Neb. 704, 687 N. W. 2d 907.

No. 04–8750. MACK *v.* SHANNON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FRACKVILLE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–8758. BRINK *v.* MISSISSIPPI. Ct. App. Miss. Certiorari denied. Reported below: 888 So. 2d 437.

No. 04–8759. BLACKWELL *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 377.

No. 04–8763. OLDEN *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 04–8769. WILLIAMS *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 147 S. W. 3d 1.

No. 04–8781. PURSLEY *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 630.

No. 04–8791. MCNORIELL *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 04–8800. JOSEY *v.* BELL COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 844.

No. 04–8805. CURRY *v.* MORGAN, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied.

No. 04–8808. WALTON *v.* STICKMAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT PITTSBURGH, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–8818. DIXON *v.* PHILLIPS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–8820. COVINGTON *v.* RENICO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–8840. MILLER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 348 Ill. App. 3d 1089, 868 N. E. 2d 1100.

No. 04–8842. RATCLIFF *v.* STATE BAR OF TEXAS ET AL. Ct. App. Tex., 7th Dist. Certiorari denied.

No. 04–8845. SCOTT *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 270 Conn. 92, 851 A. 2d 291.

No. 04–8864. WIDNER *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 123 Fed. Appx. 385.

No. 04–8865. TURNER *v.* MECHLING, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FAYETTE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–8876. HICKS *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 349 Ill. App. 3d 1051, — N. E. 2d —.

No. 04–8896. CHEARS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 349 Ill. App. 3d 1035, — N. E. 2d —.

No. 04–8899. MLASKA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 347 Ill. App. 3d 1109, 867 N. E. 2d 119.

No. 04–8904. RAMIREZ *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 852 A. 2d 1252.

No. 04–8906. MAZON *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 112 Fed. Appx. 741.

No. 04–8915. MONK *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION, ET AL. C. A. 8th Cir. Certiorari denied.

No. 04–8920. PAYTON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 04–8924. WINSLOW *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 703.

No. 04–8925. EVERETT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 893 So. 2d 1278.

No. 04–8930. DAVIS *v.* MCMAHON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 112 Fed. Appx. 865.

No. 04–8933. CLARK *v.* WOLFE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ALBION, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–8946. EARL X *v.* HOWTON, SUPERINTENDENT, OREGON STATE CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 162.

No. 04–8965. MCDONALD *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 165 N. C. App. 237, 599 S. E. 2d 50.

No. 04–9001. MARTIN *v.* WADDINGTON, SUPERINTENDENT, STAFFORD CREEK CORRECTIONS CENTER. C. A. 9th Cir. Certiorari denied. Reported below: 118 Fed. Appx. 225.

No. 04–9033. ULLMAN *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 123 Fed. Appx. 970.

No. 04–9039. CEBALLOS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 385 F. 3d 1120.

No. 04–9042. MASON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 118 Fed. Appx. 544.

No. 04–9044. WYNTER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 11 App. Div. 3d 493, 782 N. Y. S. 2d 364.

No. 04–9051. HORN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 545.

No. 04–9059. SIMMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 385 F. 3d 1347.

No. 04–9061. COLLINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 125 Fed. Appx. 977.

No. 04–9064. GIBSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 905.

No. 04–9066. BAILEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 894.

No. 04–9069. YAMI OLU *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 866 A. 2d 828.

No. 04–9073. GAMEZ-REYES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–9074. FISHER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 868 A. 2d 886.

No. 04–9076. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–9083. CALLOWAY *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE. C. A. 6th Cir. Certiorari denied.

No. 04–9088. HOFF *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–9099. OLIVER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 330.

No. 04–9108. HARRIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 118 Fed. Appx. 592.

No. 04–9109. FLINT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–9111. GRIGGS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–9115. GONZALEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 112 Fed. Appx. 868.

No. 04–9126. HAIRSTON *v.* UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 511.

No. 04–9127. GADSEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 887.

No. 04–9137. RAMSBURG *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 78.

No. 04–9140. MARTINEZ-MATA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 393 F. 3d 625.

No. 04–9150. FOXX *v.* MENDEZ, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–9152. GOMEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 353.

No. 04–9154. FORD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–9156. GASKIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 364 F. 3d 438.

No. 04–9157. DAVIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–9165. JONES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 125 Fed. Appx. 270.

No. 04–9166. FUSE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 391 F. 3d 924.

No. 04–9171. BERNAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 297.

No. 04–9173. ALLEN *v.* BROOKS, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 186.

No. 04–9179. MORRIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 118 Fed. Appx. 72.

No. 04–9196. INDUSTRIOUS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 108.

No. 04–9199. IRORERE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–9205. SLUSHER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 341 Ill. App. 3d 1111, 853 N. E. 2d 451.

No. 04–9211. CARTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 117 Fed. Appx. 688.

No. 04–9217. STANFORD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–9225. HAYDEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 837.

No. 04–9233. TREJO-PASARAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 385 F. 3d 1120.

No. 04–9234. TOLBERT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 440.

No. 04–9240. LENIAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 891.

No. 04–9244. ROMERO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 118 Fed. Appx. 528.

No. 04–9245. AGUILAR-DELGADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 120 Fed. Appx. 522.

No. 04–9247. BERNITT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 392 F. 3d 873.

No. 04–9260. BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–9265. CASTILLO REYES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 866 A. 2d 827.

No. 04–9267. PUNGITORE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–9275. CATHEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 264.

No. 04–9279. DANDRIDGE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 122 Fed. Appx. 668.

No. 04–9297. ORTIZ-HERNANDEZ, AKA ORTIZ-VACA, AKA COLUNGA, AKA CARREON ORTIZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 267.

No. 04–9298. O'DELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 118 Fed. Appx. 256.

No. 04–9300. NAVARRO-MORALES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 04–674. AMERICAN HOME PRODUCTS CORP. ET AL. *v.* COLLINS ET AL. C. A. 5th Cir. Motion of Washington Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this motion and this petition. Reported below: 343 F. 3d 765.

No. 04–679. LOCKYER, ATTORNEY GENERAL OF CALIFORNIA *v.* KENNEDY. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 379 F. 3d 1041.

No. 04–775. BLAINE COUNTY, MONTANA, ET AL. *v.* UNITED STATES. C. A. 9th Cir. Motion of petitioners to strike brief of private respondents Joseph F. McConnell et al. granted. Certiorari denied. Reported below: 363 F. 3d 897.

No. 04–808. OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS *v.* HALL. Sup. Ct. S. C. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 360 S. C. 353, 601 S. E. 2d 335.

No. 04–831. ILLINOIS CENTRAL RAILROAD CO. ET AL. *v.* SMALLWOOD. C. A. 5th Cir. Motions of Chamber of Commerce of the United States of America et al., Association of American Railroads, American Security Insurance Company, and Bryan D. Collins et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 385 F. 3d 568.

No. 04–847. CALIFORNIA *v.* HANKS. Ct. App. Cal., 5th App. Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 04–913. ILLINOIS *v.* GILBERT. App. Ct. Ill., 4th Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 347 Ill. App. 3d 1034, 808 N. E. 2d 1173.

No. 04–1058. MIKULSKI ET AL. *v.* CENTERIOR ENERGY CORP. ET AL. C. A. 6th Cir. Certiorari before judgment denied.

No. 04–8719. CHUNG *v.* BANK OF AMERICA. Ct. App. Cal., 2d App. Dist. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

*Rehearing Denied*

No. 04–517. CHRISTOPHER VILLAGE, L. P., ET AL. *v.* UNITED STATES, 543 U. S. 1146;

No. 04–570. MARTIN *v.* BOYD GAMING CORP., DBA M/V TREASURE CHEST CASINO, ET AL., 543 U. S. 1187;

No. 04–697. HUDSON *v.* AMERICAN ARBITRATION ASSN., INC., ET AL., 543 U. S. 1147;

No. 04–796. MORALES *v.* KEYSTONE DEVELOPMENT CO., LLC, ET AL., 543 U. S. 1149;

No. 04–824. SOUTHEASTERN RUBBER RECYCLING, A DIVISION OF SUNRISE GARDEN MART, INC., ET AL. *v.* ALABAMA DEPARTMENT OF PUBLIC HEALTH ET AL., 543 U. S. 1150;

No. 04–826. NSEK *v.* CIRCLE K STORES ET AL., 543 U. S. 1151;

No. 04–862. BROWN ET VIR *v.* PREMIERE DESIGNS, INC., 543 U. S. 1152;

No. 04–959. HARBUCK *v.* UNITED STATES, 543 U. S. 1153;

No. 04–1023. IN RE ADAM, 543 U. S. 1144;

No. 04–5378. WELLS *v.* JOHNSON, JUDGE, JUVENILE COURT OF LOUISIANA, EAST BATON ROUGE PARISH, 543 U. S. 896;

No. 04–6550. RICHARDSON *v.* EAGLETON, WARDEN, ET AL., 543 U. S. 1008;

No. 04–6936. HUMPHREY *v.* NEW YORK, 543 U. S. 1063;

No. 04–7050. HART *v.* MULTNOMAH COUNTY, OREGON, ET AL., 543 U. S. 1065;

No. 04–7051. HART *v.* UNITED STATES ET AL., 543 U. S. 1065;

No. 04–7056. MURESAN *v.* WASHINGTON DEPARTMENT OF SOCIAL AND HEALTH SERVICES, 543 U. S. 1155;

No. 04–7194. RICHARDSON *v.* SAFEWAY, INC., 543 U. S. 1070;

No. 04–7239. WILMS *v.* HANKS, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY, 543 U. S. 1092;

No. 04–7377. MILLER *v.* VANNATTA, SUPERINTENDENT, MIAMI CORRECTIONAL FACILITY, 543 U. S. 1126;

No. 04–7480. POTTS *v.* BAGLEY, WARDEN, 543 U. S. 1157;

No. 04–7503. YOUNG *v.* VASBINDER, WARDEN, 543 U. S. 1157;

No. 04–7516. DE MELO *v.* DEPARTMENT OF VETERANS AFFAIRS, 543 U. S. 1127;

No. 04–7531. MURDOCK *v.* AMERICAN AXLE & MANUFACTURING, INC., 543 U. S. 1158;

No. 04–7563. MILLER *v.* GEORGIA, 543 U. S. 1159;

No. 04–7605. VON BRESSENSDORF ET VIR *v.* UNITED STATES, 543 U. S. 1080;

No. 04–7657. BAYOUD *v.* BAYOUD ET AL., 543 U. S. 1162;

No. 04–7665. RAMOS *v.* UNITED STATES, 543 U. S. 1094;

No. 04–7690. ESQUIVEL-CABRERA *v.* UNITED STATES, 543 U. S. 1095;

No. 04–7695. OWEN *v.* MITCHEM, WARDEN, ET AL., 543 U. S. 1163;

No. 04–7711. REEVES *v.* MORTON, WARDEN, 543 U. S. 1164;

No. 04–7726. PIZIO *v.* NEW JERSEY, 543 U. S. 1164;

No. 04–7727. FADEAL *v.* S & S STRAND, 543 U. S. 1164;

No. 04–7748. ROBERSON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 543 U. S. 1165;

No. 04–7752. RATCLIFF *v.* INDYMAC BANK, F. S. B., 543 U. S. 1165;

No. 04–7986. GORE *v.* UNITED STATES, 543 U. S. 1181;

No. 04–8044. CRUZ *v.* UNITED STATES, 543 U. S. 1172;

No. 04–8061. COLEMAN-BEY *v.* UNITED STATES, 543 U. S. 1172;

No. 04–8070. MOORE *v.* EXXON MOBIL CORP., FKA MOBIL OIL CORP., 543 U. S. 1172;

No. 04–8077. BROWN *v.* ILLINOIS LABOR RELATIONS BOARD PANEL ET AL., 543 U. S. 1172;

No. 04–8110. HASSON, AKA GALERA *v.* UNITED STATES, 543 U. S. 1173;

No. 04–8350. VIGIL *v.* UNITED STATES, *ante*, p. 911;

No. 04–8375. VENTRICE *v.* UNITED STATES, 543 U. S. 1192; and

No. 04–8387. CLAY *v.* UNITED STATES, 543 U. S. 1192. Petitions for rehearing denied.

No. 96–6839. ALMENDAREZ-TORRES *v.* UNITED STATES, 523 U. S. 224 and 530 U. S. 1299. Motion for leave to file second petition for rehearing denied.

No. 04–6911. BURNS *v.* UNITED STATES, 543 U. S. 1011. Motion for leave to file petition for rehearing denied.

## APRIL 20, 2005

*Certiorari Denied*

No. 04–9632 (04A876). BENEFIEL *v.* DAVIS, WARDEN. C. A. 7th Cir. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Certiorari denied. Reported below: 403 F. 3d 825.

## APRIL 25, 2005

*Certiorari Granted—Vacated and Remanded*

No. 04–1263. BOYD *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further

consideration in light of *United States* v. *Booker*, 543 U. S. 220 (2005). Reported below: 115 Fed. Appx. 753.

No. 04–8789. BISHOP *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 217;

No. 04–9028. KOCH *v.* UNITED STATES. C. A. 6th Cir. Reported below: 383 F. 3d 436;

No. 04–9040. GIORDANO *v.* UNITED STATES. C. A. 11th Cir. Reported below: 125 Fed. Appx. 981;

No. 04–9107. HIGASSI, AKA AGASSI, AKA HEGGASSI *v.* UNITED STATES. C. A. 11th Cir. Reported below: 126 Fed. Appx. 462;

No. 04–9138. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 246;

No. 04–9146. PITTMAN *v.* UNITED STATES. C. A. 7th Cir. Reported below: 388 F. 3d 1104;

No. 04–9169. BLOCHER *v.* UNITED STATES. C. A. 6th Cir. Reported below: 116 Fed. Appx. 690;

No. 04–9189. MONTGOMERY *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 211;

No. 04–9191. NASH *v.* UNITED STATES. C. A. 6th Cir. Reported below: 117 Fed. Appx. 992;

No. 04–9208. COUPAR *v.* UNITED STATES. C. A. 9th Cir. Reported below: 116 Fed. Appx. 837;

No. 04–9209. DELGADO-GAMA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 304;

No. 04–9215. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 259;

No. 04–9216. SLOAN *v.* UNITED STATES. C. A. 4th Cir. Reported below: 117 Fed. Appx. 869;

No. 04–9236. THIBODAUX *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 297;

No. 04–9246. BERRYMAN *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 240;

No. 04–9251. OLIVER *v.* UNITED STATES. C. A. 6th Cir. Reported below: 390 F. 3d 482;

No. 04–9257. BOWERS *v.* UNITED STATES. C. A. 6th Cir. Reported below: 116 Fed. Appx. 736;

No. 04–9271. HERNANDEZ-NORIEGA *v.* UNITED STATES. C. A. 10th Cir. Reported below: 118 Fed. Appx. 458;

No. 04–9272. HALL *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 219;

No. 04–9273. FERNANDEZ-RODRIGUEZ *v.* UNITED STATES. C. A. 5th Cir.;

No. 04–9276. CHACON-AVITIA *v.* UNITED STATES (Reported below: 115 Fed. Appx. 749); CONEJO-CANO *v.* UNITED STATES (115 Fed. Appx. 725); GALLEGOS-LUERA, AKA TORRES-MONSISVAIS *v.* UNITED STATES (115 Fed. Appx. 280); GONZALEZ-BARRAZA *v.* UNITED STATES (115 Fed. Appx. 749); GONZALEZ-CALDERON *v.* UNITED STATES (115 Fed. Appx. 276); GRANADOS-VASQUEZ *v.* UNITED STATES (115 Fed. Appx. 729); MARTINEZ-MORALES, AKA MALDONADO, AKA MARTINEZ *v.* UNITED STATES (115 Fed. Appx. 285); MUNOZ-MARQUEZ *v.* UNITED STATES (115 Fed. Appx. 286); ONTIVEROS, AKA SAUCEDO-ONTIVEROS *v.* UNITED STATES (115 Fed. Appx. 242); ORNELAS-ESTRADA *v.* UNITED STATES (115 Fed. Appx. 283); PAXTOR *v.* UNITED STATES (115 Fed. Appx. 276); POMPA-ESTRADA *v.* UNITED STATES (115 Fed. Appx. 284); PONCE-SANCHEZ *v.* UNITED STATES (115 Fed. Appx. 741); REYES-GURROLA *v.* UNITED STATES (115 Fed. Appx. 272); RIVAS-GARCIA *v.* UNITED STATES (115 Fed. Appx. 250); RUIZ-LEVARIO, AKA RUIZ *v.* UNITED STATES (115 Fed. Appx. 269); RUIZ-LOERA, AKA RUIZ LOERA, AKA RIVERA-HERNANDEZ *v.* UNITED STATES (115 Fed. Appx. 232); ROLDAN-GIL *v.* UNITED STATES (115 Fed. Appx. 249); SALAZAR-MONTES, AKA NOE SALAZAR, AKA SALAZAR *v.* UNITED STATES (115 Fed. Appx. 270); VALENZUELA-LUNA *v.* UNITED STATES (115 Fed. Appx. 241); VASQUEZ-SORIA *v.* UNITED STATES (115 Fed. Appx. 282); and ARANDA-CRUZ, AKA ARNADA-CRUZ *v.* UNITED STATES (115 Fed. Appx. 270). C. A. 5th Cir.;

No. 04–9278. CARRASCO-AVITIA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 750;

No. 04–9280. SANCHEZ-PENA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 710;

No. 04–9288. MARTINEZ-ESPARZA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 117 Fed. Appx. 984;

No. 04–9292. ORTIZ JACOBO, AKA ORTIZ-JACOBO *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 265;

No. 04–9296. MOYE *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 273;

No. 04–9299. MORRIS *v.* UNITED STATES. C. A. 3d Cir.;

No. 04–9301. BRISEDA PEREZ, AKA ARRELLANO-GOMEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 220;

No. 04–9302. TAIWO *v.* UNITED STATES. C. A. 5th Cir. Reported below: 114 Fed. Appx. 644;

No. 04–9310. ALTSCHUL *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 712;

No. 04–9312. BEN *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 275;

No. 04–9313. BERNAL-ISLER *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 736;

No. 04–9317. MUNIZ-TAPIA *v.* UNITED STATES; DE LA CRUZ *v.* UNITED STATES; and TAPIA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 719 (first judgment), 733 (second judgment), and 755 (third judgment);

No. 04–9390. SULEIMAN *v.* UNITED STATES. C. A. 11th Cir. Reported below: 126 Fed. Appx. 463; and

No. 04–9391. STANDRIDGE *v.* UNITED STATES. C. A. 10th Cir. Reported below: 119 Fed. Appx. 243. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Booker*, 543 U. S. 220 (2005).

*Certiorari Dismissed*

No. 04–8838. LUNDAHL *v.* ELI LILLY & CO. ET AL. C. A. 10th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein. JUSTICE O'CONNOR took no part in the consideration or decision of this motion and this petition.

No. 04–9364. GALLARDO *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

*Miscellaneous Orders**

No. 03A511. MAXWELL *v.* SMITH. Application for certificate of appealability, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. 03–7434. BENITEZ *v.* ROZOS, FIELD OFFICE DIRECTOR, MIAMI, IMMIGRATION AND CUSTOMS ENFORCEMENT, 543 U. S. 371. Motion of petitioner for attorney's fees under Equal Access to Justice Act denied without prejudice to filing in the United States Court of Appeals for the Eleventh Circuit.

No. 04–1095. MINISTRY OF DEFENSE AND SUPPORT FOR THE ARMED FORCES OF THE ISLAMIC REPUBLIC OF IRAN *v.* ELAHI. C. A. 9th Cir. The Acting Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 04–9519. IN RE AL-HAKIM. Petition for writ of habeas corpus denied.

No. 04–8940. IN RE NZONGOLA. Petition for writ of mandamus denied.

*Certiorari Granted*

No. 04–593. DOMINO'S PIZZA, INC., ET AL. *v.* MCDONALD. C. A. 9th Cir. Certiorari granted. Reported below: 107 Fed. Appx. 18.

No. 04–848. DOLAN *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 377 F. 3d 285.

No. 04–881. LOCKHART *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 376 F. 3d 1027.

No. 04–928. OREGON *v.* GUZEK. Sup. Ct. Ore. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 336 Ore. 424, 86 P. 3d 1106.

No. 04–1140. MARTIN ET UX. *v.* FRANKLIN CAPITAL CORP. ET AL. C. A. 10th Cir. Certiorari granted. Reported below: 393 F. 3d 1143.

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*For the Court's orders prescribing amendments to the Federal Rules of Appellate Procedure, see *post*, p. 1153; amendments to the Federal Rules of Bankruptcy Procedure, see *post*, p. 1165; amendments to the Federal Rules of Civil Procedure, see *post*, p. 1175; and amendments to the Federal Rules of Criminal Procedure, see *post*, p. 1183.

*Certiorari Denied*

No. 04–973. RODRIGUEZ-FREYTAS *v.* NEW YORK CITY TRANSIT AUTHORITY; and

No. 04–1137. NEW YORK CITY TRANSIT AUTHORITY *v.* RODRIGUEZ-FREYTAS. C. A. 2d Cir. Certiorari denied. Reported below: 95 Fed. Appx. 392.

No. 04–1103. SCARBOROUGH, INDIVIDUALLY AND ON BEHALF OF DECEDENT SCARBOROUGH, ET AL. *v.* CLEMCO INDUSTRIES, INC., AKA CLEMCO-CLEMINTINA LTD., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 391 F. 3d 660.

No. 04–1108. FRAZIER *v.* FRAZIER ET AL. Ct. App. Cal., 6th App. Dist. Certiorari denied.

No. 04–1110. GREGORY *v.* SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 87.

No. 04–1112. AIR CONDITIONING TRADES ASSOCIATION UNILATERAL APPRENTICESHIP COMMITTEE ET AL. *v.* CALIFORNIA APPRENTICESHIP COUNCIL ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 04–1120. DAVIS ET UX. *v.* BRAZOS COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 98 Fed. Appx. 976.

No. 04–1121. THORNBURY NOBLE, LTD. *v.* THORNBURY TOWNSHIP, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 112 Fed. Appx. 185.

No. 04–1123. MORGAN ET AL. *v.* UNITED PARCEL SERVICE OF AMERICA, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 380 F. 3d 459.

No. 04–1124. O'BANER *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 159 S. W. 3d 605.

No. 04–1126. MCDOUGALL ET AL. *v.* C. C. MID WEST, INC. Sup. Ct. Mich. Certiorari denied. Reported below: 470 Mich. 878, 683 N. W. 2d 142.

No. 04–1143. BANNER RESTORATIONS, INC. *v.* BRICKLAYERS LOCAL 21 OF ILLINOIS APPRENTICESHIP AND TRAINING PROGRAM

ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 385 F. 3d 761.

No. 04–1147. BUDDE *v.* HARLEY-DAVIDSON, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 116 Fed. Appx. 270.

No. 04–1167. SALEH *v.* GONZALES, ATTORNEY GENERAL. C. A. 1st Cir. Certiorari denied.

No. 04–1184. STARK ET UX. *v.* EMC MORTGAGE CORP. C. A. 8th Cir. Certiorari denied. Reported below: 381 F. 3d 793.

No. 04–1185. BREITINGER ET AL. *v.* NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION. Super. Ct. N. J., App. Div. Certiorari denied.

No. 04–1215. LEWIS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 892.

No. 04–1234. THURLOW, PERSONAL REPRESENTATIVE OF THE ESTATE OF HAASE, DECEASED *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied.

No. 04–1235. TOLBERT, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF TOLBERT, A DECEASED MINOR *v.* TOLBERT, AS ADMINISTRATOR OF THE ESTATE OF KEY, DECEASED. Sup. Ct. Ala. Certiorari denied. Reported below: 903 So. 2d 103.

No. 04–1266. SKELDON *v.* GONZALES, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 415.

No. 04–1278. KLIMAS *v.* DEPARTMENT OF THE TREASURY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 122 Fed. Appx. 355.

No. 04–1287. TEXAS *v.* VALDEZ. Ct. Crim. App. Tex. Certiorari denied. Reported below: 158 S. W. 3d 438.

No. 04–7596. MANESSIS *v.* NEW YORK CITY DEPARTMENT OF TRANSPORTATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 86 Fed. Appx. 464.

No. 04–7810. CONTEH *v.* GONZALES, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 942.

No. 04–8386. COLE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 33 Cal. 4th 1158, 95 P. 3d 811.

No. 04–8530. BAKER *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 383 Md. 550, 861 A. 2d 48.

No. 04–8557. WHITNEY *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 99 P. 3d 457.

No. 04–8730. HAMILTON *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 383 Md. 570, 861 A. 2d 60.

No. 04–8734. HENDRICKS *v.* RUSHTON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 796.

No. 04–8738. FELDER *v.* MCKINNEY ET AL. C. A. 7th Cir. Certiorari denied.

No. 04–8742. SMITH *v.* TEXAS. Ct. App. Tex., 11th Dist. Certiorari denied.

No. 04–8745. COLEMAN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–8746. WALDON *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 04–8747. MOSELEY *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–8748. OWEN *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 61 Mass. App. 711, 813 N. E. 2d 1284.

No. 04–8754. JACKSON *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 744.

No. 04–8755. RODRIGUEZ *v.* GOORD, COMMISSIONER, NEW YORK DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 2d Cir. Certiorari denied.

No. 04–8757. SMITH *v.* GAMBRELL ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 218.

No. 04–8766. VIGNOLO *v.* BUDGE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 863.

No. 04–8771. TATE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 04–8776. PARKS *v.* BOYETTE, SUPERINTENDENT, NASH CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 573.

No. 04–8778. ELLIS *v.* EMERY, TRUSTEE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 153.

No. 04–8780. CLARK *v.* MISSOURI BOARD OF PROBATION AND PAROLE. C. A. 8th Cir. Certiorari denied.

No. 04–8782. MUNGO *v.* GREENE, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 393 F. 3d 327.

No. 04–8783. MANSON *v.* HOFBAUER, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 04–8784. MORRIS *v.* COURT OF APPEALS OF NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 765.

No. 04–8787. BLANEY *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 335.

No. 04–8788. BRADLEY *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 04–8795. RILEY *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 278 Ga. 677, 604 S. E. 2d 488.

No. 04–8797. SOSA *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–8798. MUNSON *v.* METRISH, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 384 F. 3d 310.

No. 04–8799. LOFTON *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 349 Ill. App. 3d 1048, — N. E. 2d —.

No. 04–8801. JACKSON *v.* CITY OF SIKESTON POLICE DEPARTMENT. C. A. 8th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 766.

No. 04–8802. JUSTICE *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 104.

No. 04–8803. JOHNSON *v.* BOBBY, WARDEN. Sup. Ct. Ohio. Certiorari denied. Reported below: 103 Ohio St. 3d 96, 814 N. E. 2d 61.

No. 04–8804. KWIATKOWSKI *v.* J. P. MORGAN CHASE & CO. C. A. 2d Cir. Certiorari denied. Reported below: 112 Fed. Appx. 797.

No. 04–8806. TURNER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 348 Ill. App. 3d 1091, 868 N. E. 2d 1101.

No. 04–8809. THOMAS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 894 So. 2d 126.

No. 04–8810. WILLIAMS *v.* BRADSHAW, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 380 F. 3d 932.

No. 04–8815. BOVELL *v.* GONZALES, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 04–8816. BURGESS *v.* MISSOURI. Ct. App. Mo. Certiorari denied. Reported below: 147 S. W. 3d 822.

No. 04–8821. PORTER *v.* GREER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 04–8822. OPONG-MENSAH *v.* STRACENER ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 04–8824. SOSA *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–8825. PETRALIA *v.* OHIO. Ct. App. Ohio, Lake County. Certiorari denied.

No. 04–8827. BARRY *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 04–8830. BURNS *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied.

No. 04–8837. SCHMIDT *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA. C. A. 11th Cir. Certiorari denied.

No. 04–8867. HURLEY *v.* QWEST COMMUNICATIONS INC. EMPLOYEES ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–8878. GUTIERREZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–8892. DEOLEO *v.* MILLER, SUPERINTENDENT, EASTERN NEW YORK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–8912. BROWN *v.* CHESNEY, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT RETREAT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–8919. MILES *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 166.

No. 04–8935. JOHNSON *v.* WILBUR ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 895 So. 2d 405.

No. 04–8951. SMITH *v.* VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 729.

No. 04–8956. STALLINGS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 888 So. 2d 220.

No. 04–8962. BURR *v.* HUFF ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 537.

No. 04–8970. SANDERS *v.* ROZNER. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 346 Ill. App. 3d 1181, 866 N. E. 2d 714.

No. 04–8987. BENGE *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 862 A. 2d 385.

No. 04–8999. PEREA *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL. (two judgments). C. A. 5th Cir. Certiorari denied.

No. 04–9047. ROSE *v.* SONNEN, ADMINISTRATOR, IDAHO DEPARTMENT OF CORRECTION, OPERATIONS DIVISION. C. A. 9th Cir. Certiorari denied.

No. 04–9052. FALKIEWICZ *v.* WHITE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–9070. JAMES *v.* HARRISON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 389 F. 3d 450.

No. 04–9075. GAINES *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 894 A. 2d 246.

No. 04–9087. FERNANDEZ *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 04–9105. BRYAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 125 Fed. Appx. 982.

No. 04–9112. GOMEZ *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. Sup. Ct. Va. Certiorari denied.

No. 04–9128. FULLER *v.* CONWAY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–9151. GRANDISON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 541.

No. 04–9161. EVICCI *v.* DENNEHY, COMMISSIONER, MASSACHUSETTS DEPARTMENT OF CORRECTION. C. A. 1st Cir. Certiorari denied. Reported below: 387 F. 3d 37.

No. 04–9163. JOHNSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 04–9178. PETERSON *v.* KING, SUPERINTENDENT, SOUTH MISSISSIPPI CORRECTIONAL FACILITY. C. A. 5th Cir. Certiorari denied.

No. 04–9186. EAK *v.* MECHLING, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FAYETTE. C. A. 3d Cir. Certiorari denied.

No. 04–9187. CRUTHIRD *v.* DISTRICT ATTORNEY, SUFFOLK COUNTY, MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 62 Mass. App. 1113, 818 N. E. 2d 1098.

No. 04–9206. RITCHIE *v.* CLUFF, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–9224. FULLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 212.

No. 04–9226. MILLS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 124 Fed. Appx. 640.

No. 04–9254. BLUBAUGH *v.* AMERICAN CONTRACT BRIDGE LEAGUE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 117 Fed. Appx. 475.

No. 04–9266. MUNSON *v.* MCADORY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 04–9268. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 117 Fed. Appx. 256.

No. 04–9277. CASTRO, AKA SANCHEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 202.

No. 04–9281. SHAMBRY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 392 F. 3d 631.

No. 04–9285. LUONG, AKA AH SING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 393 F. 3d 913.

No. 04–9287. LOPEZ-MUNOZ *v.* UNITED STATES; and ORDUNA-CARRILLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 271 (first judgment) and 730 (second judgment).

No. 04–9289. MASKO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 04–9293. CAMERON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 162.

No. 04–9294. CONTRERAS-VELASQUEZ, AKA CONTRERAS, AKA RAMIREZ, AKA RAMIREZ CONTRERAS, AKA LEON CONTRERAS *v.* UNITED STATES; RAMIREZ-TORRES, AKA ZAVALSA-RIVERA *v.* UNITED STATES; and REGIL-RODRIGUEZ, AKA FIGUEROA-RIOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 244 (first judgment), 245 (third judgment), and 268 (second judgment).

No. 04–9303. WOOD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 119 Fed. Appx. 593.

No. 04–9304. WALL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 117 Fed. Appx. 252.

No. 04–9319. MEDINA-MARTINEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 396 F. 3d 1.

No. 04–9321. LEWIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–9325. NINO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 126 Fed. Appx. 463.

No. 04–9327. JIMENEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–9330. ANTUNA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 04–9339. SOUTHARD *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–9340. RUSS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 129 Fed. Appx. 598.

No. 04–9345. RENEAU *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 117 Fed. Appx. 135.

No. 04–9350. MASON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–9352. ORDAZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 119 Fed. Appx. 407.

No. 04–9355. SHARP *v.* HENNEPIN COUNTY MEDICAL CENTER. Ct. App. Minn. Certiorari denied.

No. 04–9358. DANIELS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–9361. ABDULLAH-MALIK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 122 Fed. Appx. 36.

No. 04–9367. ISLAM *v.* BRAXTON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 357.

No. 04–9372. CAIN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 04–9374. CUEVAS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–9376. WINGATE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 113 Fed. Appx. 522.

No. 04–9377. WADDELL, AKA SALAAM *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 04–9387. HUTCHERSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–9389. WONGUS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–9393. DIAZ-REYES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 739.

No. 04–9395. LONDONO-TABAREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 121 Fed. Appx. 882.

No. 04–9397. BIDWELL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 393 F. 3d 1206.

No. 04–9398. BROOKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–9402. GOMEZ-BALLESTEROS, AKA CHAVEZ *v.* UNITED STATES; VICTORIANO GONZALEZ *v.* UNITED STATES; ROANO-BUSTIAN, AKA ROANO-BASTIAN *v.* UNITED STATES; and SALAZAR-MONTES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 246 (third judgment), 277 (second judgment), 282 (first judgment), and 286 (fourth judgment).

No. 04–9404. KIRKSEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–9408. CRUZ-CANSECO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 119 Fed. Appx. 109.

No. 04–9411. SPENCER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 119 Fed. Appx. 21.

No. 04–9416. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 791.

No. 04–9418. HOANG AI LE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 393 F. 3d 913.

No. 04–9419. WASHINGTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 501.

No. 04–9421. MUZA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–9423. MUNRO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 394 F. 3d 865.

No. 04–9433. SANCHEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 388 F. 3d 1199.

No. 04–9439. MEANS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–9445. TEEMER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 394 F. 3d 59.

No. 04–9447. TREVINO-ZARAGOZA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 119 Fed. Appx. 632.

No. 04–9449. OSBORNE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–9450. NEPTUNE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–9451. PONTILLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 04–9459. RICHARDSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 909.

No. 04–9461. SANDERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 117 Fed. Appx. 299.

No. 04–9463. HERNANDEZ CARDENAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 121 Fed. Appx. 21.

No. 04–9470. WALSH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–9472. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 04–9474. COLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–9483. JEFFERS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 388 F. 3d 289.

No. 04–9484. CARPA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 129 Fed. Appx. 601.

No. 04–820. ACREE ET AL. *v.* REPUBLIC OF IRAQ ET AL. C. A. D. C. Cir. Motions of Washington Legal Foundation et al., St. Mary's University School of Law et al., and Center for Justice & Accountability and International Law Scholars for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 370 F. 3d 41.

No. 04–1216. SAGE HOSPITALITY RESOURCES, LLC *v.* HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 57. C. A. 3d Cir. Motions of National Right to Work Legal Defense Foundation et al. and Chamber of Commerce of the United States of America et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 390 F. 3d 206.

No. 04–8764. MULLIN *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

*Rehearing Denied*

No. 04–750. GOULD *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, 543 U. S. 1148;

No. 04–5054. ISRAEL *v.* UNITED STATES, 543 U. S. 1122;

No. 04–6390. MARTINEZ-JARAMILLO *v.* GONZALES, ATTORNEY GENERAL, 543 U. S. 1154;

No. 04–6713. NUNES *v.* GONZALES, ATTORNEY GENERAL, 543 U. S. 1188;

No. 04–7430. CONNER *v.* MCBRIDE, SUPERINTENDENT, MAXIMUM CONTROL FACILITY, 543 U. S. 1189;

No. 04–7580. GERBER *v.* CAMP HOPE CHILDREN'S BIBLE FELLOWSHIP OF NEW YORK, INC., 543 U. S. 1159;

No. 04–7591. BEY *v.* YOUNG, WARDEN, 543 U. S. 1160;

No. 04–7952. LUCZAK *v.* MOTE, WARDEN, 543 U. S. 1191;

No. 04–8139. COPLIN *v.* UNITED STATES, 543 U. S. 1174;

No. 04–8166. GONZALEZ LORA *v.* UNITED STATES, 543 U. S. 1174;

No. 04–8237. PASTER *v.* UNITED STATES, 543 U. S. 1176; and

No. 04–8586. HAMMER *v.* TRENDL, *ante*, p. 933. Petitions for rehearing denied.

APRIL 26, 2005

*Certiorari Denied*

No. 04–9765 (04A903). JONES *v.* MISSOURI. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

No. 04–9817 (04A912). JONES *v.* PURKETT, SUPERINTENDENT, EASTERN RECEPTION, DIAGNOSTIC AND CORRECTIONAL CENTER. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

No. 04–9848 (04A917). JONES *v.* CRAWFORD, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

APRIL 28, 2005

*Miscellaneous Order*

No. 04M73 (04A923). CENTOBIE *v.* CAMPBELL, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Motion for leave to

proceed *in forma pauperis* without an affidavit of indigency executed by petitioner denied.

APRIL 29, 2005

*Dismissal Under Rule 46*

No. 04–1214. KFC U. S. PROPERTIES, INC., FKA KFC NATIONAL MANAGEMENT CO. *v.* WILLIAMS. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 391 F. 3d 411.

MAY 2, 2005

*Certiorari Granted—Vacated and Remanded*

No. 03–1427. EUROPEAN COMMUNITY ET AL. *v.* RJR NABISCO, INC., ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pasquantino* v. *United States*, *ante*, p. 349. Reported below: 355 F. 3d 123.

No. 04–81. BASF CORP. *v.* PETERSON ET AL. Sup. Ct. Minn. Motions of CropLife America, Chamber of Commerce of the United States of America, and Product Liability Advisory Council, Inc., for leave to file briefs as *amici curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bates* v. *Dow Agrosciences LLC*, *ante*, p. 431. Reported below: 675 N. W. 2d 57.

No. 04–579. OKEN *v.* MONSANTO CO. ET AL. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Bates* v. *Dow Agrosciences LLC*, *ante*, p. 431. Reported below: 371 F. 3d 1312.

No. 04–1021. MICHIGAN HIGH SCHOOL ATHLETIC ASSN., INC., ON BEHALF OF ITSELF AND ITS MEMBERS *v.* COMMUNITIES FOR EQUITY, ON BEHALF OF ITSELF, ITS MEMBERS, AND ALL OTHERS SIMILARLY SITUATED, ET AL. C. A. 6th Cir. Motions of Michigan Interscholastic Athletic Administrators Association, Michigan Association of School Boards, Basketball Coaches Association of Michigan, and National Federation of State High School Associations for leave to file briefs as *amici curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Rancho Palos Verdes* v. *Abrams*, *ante*, p. 113. Reported below: 377 F. 3d 504.

No. 04–7904. CRUZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 388 F. 3d 150;

No. 04–8921. QUINONES *v.* UNITED STATES. C. A. 9th Cir. Reported below: 106 Fed. Appx. 618;

No. 04–9121. CASTRO *v.* UNITED STATES. C. A. 11th Cir. Reported below: 125 Fed. Appx. 981;

No. 04–9170. BIFFLE *v.* UNITED STATES. C. A. 11th Cir. Reported below: 126 Fed. Appx. 463;

No. 04–9210. CLEDANOR *v.* UNITED STATES. C. A. 11th Cir. Reported below: 127 Fed. Appx. 473;

No. 04–9212. COTNEY *v.* UNITED STATES. C. A. 11th Cir. Reported below: 120 Fed. Appx. 785;

No. 04–9261. BAXTER *v.* UNITED STATES. C. A. 11th Cir. Reported below: 127 Fed. Appx. 471;

No. 04–9295. CAMPOS-AIZPURO *v.* UNITED STATES; CAMPOS-CRUZ *v.* UNITED STATES; CHAVEZ-DELGADO *v.* UNITED STATES; HERNANDEZ-ESCAJEDA *v.* UNITED STATES; MAGALLANES-RODRIGUEZ *v.* UNITED STATES; MOYA *v.* UNITED STATES; VALENZUELA-RIVERA, AKA RIVERA-CALDERA *v.* UNITED STATES; and VIZCAINO-AMARO, AKA VIZCAINO *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 271 (third judgment), 279 (fifth judgment), 280 (fourth judgment), 718 (sixth judgment), 727 (first judgment), 742 (eighth judgment), 752 (second judgment), and 758 (seventh judgment);

No. 04–9306. VENCES *v.* UNITED STATES; GUARDADO-ORTEGA *v.* UNITED STATES; LOPEZ-TOVAR *v.* UNITED STATES; TREJO-HERNANDEZ *v.* UNITED STATES; SAUZO-IZAGUIRRE *v.* UNITED STATES; and LOREDO-PECINA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 223 (first judgment), 236 (third judgment), 237 (sixth judgment), 253 (fifth judgment), 254 (fourth judgment), and 288 (second judgment);

No. 04–9308. THIBODEAUX *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 708;

No. 04–9309. VELOZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 278;

No. 04–9314. BARRON-TORRES *v.* UNITED STATES (Reported below: 115 Fed. Appx. 247); CAMACHO-MUNOZ *v.* UNITED STATES (115 Fed. Appx. 240); CAPELLAN-FIGUEREO *v.* UNITED STATES (115 Fed. Appx. 283); JIMENEZ-CORDOVA *v.* UNITED STATES (115 Fed. Appx. 268); MACIAS-ORTIZ *v.* UNITED STATES (115 Fed. Appx. 750); MENDEZ-CHAVEZ *v.* UNITED STATES (115 Fed. Appx.

267); RODRIGUEZ-VERA *v.* UNITED STATES (115 Fed. Appx. 727); TREJO-LOPEZ *v.* UNITED STATES (115 Fed. Appx. 241); and VENEGAS-QUEZADA *v.* UNITED STATES (115 Fed. Appx. 243). C. A. 5th Cir.;

No. 04–9315. BAEZ *v.* UNITED STATES; CASTORENA-RAMIREZ *v.* UNITED STATES (Reported below: 115 Fed. Appx. 281); GONZALEZ-LABORICO *v.* UNITED STATES (115 Fed. Appx. 248); GUTIERREZ-GUEVARA *v.* UNITED STATES (115 Fed. Appx. 260); HERNANDEZ-GARCIA *v.* UNITED STATES (115 Fed. Appx. 747); HERRERA-FLORES *v.* UNITED STATES (115 Fed. Appx. 261); IBARRA-ARELLANO *v.* UNITED STATES (115 Fed. Appx. 748); RAMIREZ-GARCIA *v.* UNITED STATES (115 Fed. Appx. 263); RAMOS-ZUNIGA *v.* UNITED STATES (115 Fed. Appx. 263); RODRIGUEZ-GASPAR *v.* UNITED STATES (115 Fed. Appx. 715); ROJAS-DE-LA ROSA *v.* UNITED STATES (115 Fed. Appx. 247); SANCHEZ-MENDEZ *v.* UNITED STATES (115 Fed. Appx. 265); and VASQUEZ-RAMOS *v.* UNITED STATES. C. A. 5th Cir.;

No. 04–9316. DE LA CRUZ-GONZALEZ *v.* UNITED STATES (Reported below: 115 Fed. Appx. 224); LOPEZ-CRUZ *v.* UNITED STATES (115 Fed. Appx. 732); ARAGUZ-RAMIREZ *v.* UNITED STATES (115 Fed. Appx. 291); CANTU-RIOS *v.* UNITED STATES (115 Fed. Appx. 744); CASTILLO-BUSTAMANTE, AKA GARCIA *v.* UNITED STATES (115 Fed. Appx. 734); MENDOZA-SIFUENTES *v.* UNITED STATES (115 Fed. Appx. 251); TORRES-AVILA *v.* UNITED STATES (115 Fed. Appx. 289); HERNANDEZ-GONZALEZ *v.* UNITED STATES (115 Fed. Appx. 256); VELA-SALINAS *v.* UNITED STATES (115 Fed. Appx. 238); NIEVES-ALVAREZ *v.* UNITED STATES (115 Fed. Appx. 746); RAMIREZ-SANTANA *v.* UNITED STATES (115 Fed. Appx. 235); VASQUEZ-ALEJOS, AKA MAYA-GALVAN *v.* UNITED STATES (115 Fed. Appx. 252); PEREZ-TOSTADO *v.* UNITED STATES (115 Fed. Appx. 257); SAYAS-MONTOYA *v.* UNITED STATES (115 Fed. Appx. 298); ROSALES *v.* UNITED STATES (115 Fed. Appx. 709); CRUZ *v.* UNITED STATES (115 Fed. Appx. 721); ARVIZU-GARCIA *v.* UNITED STATES (115 Fed. Appx. 723); VACA-HERNANDEZ *v.* UNITED STATES (115 Fed. Appx. 706); ESPINOZA-CORTEZ *v.* UNITED STATES (115 Fed. Appx. 722); LOPEZ-CRUZ *v.* UNITED STATES (115 Fed. Appx. 742); SAN MARTIN, AKA HERNANDEZ-LOZANO *v.* UNITED STATES (117 Fed. Appx. 985); GARCIA *v.* UNITED STATES (115 Fed. Appx. 735); GONZALEZ-MATA, AKA GONZALEZ *v.* UNITED STATES (115 Fed. Appx. 258); GUTIERREZ-SUAREZ *v.* UNITED STATES (115 Fed. Appx. 256); ALANIS-GONZALES, AKA ROBLEDO-

PESINA *v.* UNITED STATES (115 Fed. Appx. 255); ROMERO RODRIGUEZ *v.* UNITED STATES (115 Fed. Appx. 745); CISNEROS-CAVAZOS *v.* UNITED STATES (115 Fed. Appx. 740); ARELLANO-RIOS *v.* UNITED STATES (115 Fed. Appx. 720); RAMOS-LUCAS *v.* UNITED STATES (115 Fed. Appx. 733); and ALBARENGA-VILLALOBO *v.* UNITED STATES (115 Fed. Appx. 712). C. A. 5th Cir.;

No. 04–9348. CALTON *v.* UNITED STATES. C. A. 5th Cir. Reported below: 117 Fed. Appx. 982;

No. 04–9349. LONGBINE *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 221;

No. 04–9365. GOMEZ *v.* UNITED STATES. C. A. 8th Cir. Reported below: 111 Fed. Appx. 855;

No. 04–9381. GARCIA-VARGAS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 288;

No. 04–9382. FLORES *v.* UNITED STATES. C. A. 5th Cir. Reported below: 122 Fed. Appx. 720;

No. 04–9384. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 230;

No. 04–9385. HERNANDEZ-BAIDE *v.* UNITED STATES. C. A. 10th Cir. Reported below: 392 F. 3d 1153;

No. 04–9401. GONZALEZ-ANTUNA *v.* UNITED STATES; MENCHACA-MORENO, AKA AMUNDO MENCHACA *v.* UNITED STATES; NAVARETTE-CASTILLO, AKA CASTILLO-NAVARETTE *v.* UNITED STATES; and VARELA-MARQUEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 274 (second judgment), 277 (third judgment), 718 (first judgment), and 728 (fourth judgment);

No. 04–9407. DELEON-GARCIA *v.* UNITED STATES. C. A. 5th Cir. Reported below: 119 Fed. Appx. 605;

No. 04–9412. WELCH *v.* UNITED STATES. C. A. 11th Cir. Reported below: 127 Fed. Appx. 473;

No. 04–9414. NAJERA-MORALES *v.* UNITED STATES. C. A. 10th Cir. Reported below: 113 Fed. Appx. 366;

No. 04–9424. JACOBS *v.* UNITED STATES. C. A. 11th Cir. Reported below: 127 Fed. Appx. 471;

No. 04–9425. JONES *v.* UNITED STATES. C. A. 5th Cir. Reported below: 120 Fed. Appx. 524;

No. 04–9429. SZABO *v.* UNITED STATES. C. A. 11th Cir. Reported below: 127 Fed. Appx. 473;

No. 04–9436. NAVARRO-GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Reported below: 116 Fed. Appx. 123;

No. 04–9453. BARRERA-GONZALEZ *v.* UNITED STATES. C. A. 9th Cir. Reported below: 116 Fed. Appx. 886;

No. 04–9465. COUNTERMAN *v.* UNITED STATES. C. A. 6th Cir. Reported below: 121 Fed. Appx. 581;

No. 04–9480. BECK *v.* UNITED STATES. C. A. 9th Cir. Reported below: 393 F. 3d 1088;

No. 04–9516. QUEJADA-POMARE *v.* UNITED STATES. C. A. 11th Cir.;

No. 04–9524. JOHNSON, AKA POWELL *v.* UNITED STATES. C. A. 11th Cir.;

No. 04–9528. RESTREPO *v.* UNITED STATES. C. A. 11th Cir. Reported below: 125 Fed. Appx. 976; and

No. 04–9577. MERAZ-AMADO *v.* UNITED STATES. C. A. 5th Cir. Reported below: 117 Fed. Appx. 370. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Booker*, 543 U. S. 220 (2005).

*Certiorari Dismissed*

No. 04–9020. YOWEL, AKA ROBINSON *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 112 Fed. Appx. 276.

No. 04–9203. REED *v.* ARIZONA ET AL. Ct. App. Ariz. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

*Miscellaneous Orders* *

No. 04M67. GARCIA-MEJIA *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari under seal with redacted copies for the public record granted.

No. 04M68. SLAUGHTER *v.* METRISH, WARDEN. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 04M69. TURNER *v.* CALIFORNIA. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed

*For revisions to the Rules of this Court effective this date, see *post*, p. 1071.

by petitioner denied. JUSTICE STEVENS and JUSTICE BREYER would grant the motion.

No. 04–980. BROWN, WARDEN *v.* SANDERS. C. A. 9th Cir. [Certiorari granted, *ante*, p. 947.] Motion of respondent for appointment of counsel granted. Nina Rivkind, Esq., of San Francisco, Cal., is appointed to serve as counsel for respondent in this case.

No. 04–8116. S. C. ET VIR *v.* R. Y. ET UX. Sup. Ct. Miss. Motion of petitioners for reconsideration of order denying leave to proceed *in forma pauperis* [*ante*, p. 919] denied.

No. 04–9534. IN RE YOUNG-COOPER;
No. 04–9595. IN RE BURRELL; and
No. 04–9619. IN RE ALI. Petitions for writs of habeas corpus denied.

No. 04–8934. IN RE CARDWELL. Petition for writ of mandamus denied.

*Certiorari Granted*

No. 04–721. LAMARQUE, WARDEN *v.* CHAVIS. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 382 F. 3d 921.

No. 04–1152. RUMSFELD, SECRETARY OF DEFENSE, ET AL. *v.* FORUM FOR ACADEMIC & INSTITUTIONAL RIGHTS, INC., ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 390 F. 3d 219.

*Certiorari Denied*

No. 04–294. FOUNTAIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 357 F. 3d 250.

No. 04–1009. INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. *v.* FINK, DIRECTOR, MICHIGAN OFFICE OF THE STATE EMPLOYER, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 385 F. 3d 1003.

No. 04–1012. HAIRE *v.* MESHULAM. C. A. D. C. Cir. Certiorari denied. Reported below: 378 F. 3d 1100.

No. 04–1024. O'CONNOR *v.* CHURCH OF ST. IGNATIUS LOYOLA ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 8 App. Div. 3d 125, 779 N. Y. S. 2d 31.

No. 04–1055. SAFE AIR FOR EVERYONE *v.* MEYER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 373 F. 3d 1035.

No. 04–1141. KYLES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 349 Ill. App. 3d 1036, — N. E. 2d —.

No. 04–1145. BENSEL ET AL. *v.* ALLIED PILOTS ASSN. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 387 F. 3d 298.

No. 04–1151. PITTS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 125 Fed. Appx. 978.

No. 04–1155. GRAHAM *v.* E–J ELECTRIC INSTALLATION CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 110 Fed. Appx. 192.

No. 04–1156. CITIZENS FINANCIAL GROUP, INC. *v.* CITIZENS NATIONAL BANK OF EVANS CITY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 383 F. 3d 110.

No. 04–1161. VANGUILDER *v.* NEW YORK. Sup. Ct. N. Y., Washington County. Certiorari denied.

No. 04–1163. STEPHENS *v.* UNION CARBIDE CORP. ET AL. C. A. 6th Cir. Certiorari denied.

No. 04–1166. ROSSI, DBA INTERNETMOVIES.COM *v.* MOTION PICTURE ASSOCIATION OF AMERICA, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 391 F. 3d 1000.

No. 04–1192. HEIDE ET AL. *v.* FEDERAL AVIATION ADMINISTRATION. C. A. 8th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 724.

No. 04–1194. HARLEY *v.* ADLER ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 7 App. Div. 3d 570, 775 N. Y. S. 2d 892.

No. 04–1212. DODAJ ET AL. *v.* GONZALES, ATTORNEY GENERAL. C. A. 6th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 763.

No. 04–1222. DAVIS ET AL. *v.* UNITED AUTOMOBILE WORKERS OF AMERICA. C. A. 6th Cir. Certiorari denied. Reported below: 390 F. 3d 908.

No. 04–1223. GRAJALES *v.* GONZALES, ATTORNEY GENERAL. C. A. 11th Cir. Certiorari denied. Reported below: 125 Fed. Appx. 981.

No. 04–1231. TOLLIVER *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 347 Ill. App. 3d 203, 807 N. E. 2d 524.

No. 04–1245. ROACH *v.* ROACH. Ct. App. Ariz. Certiorari denied.

No. 04–1251. MEDPOINTE HEALTHCARE, INC. *v.* HI-TECH PHARMACAL CO., INC. C. A. Fed. Cir. Certiorari denied. Reported below: 115 Fed. Appx. 76.

No. 04–1256. WHITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–1267. ORD *v.* SECURITIES AND EXCHANGE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied.

No. 04–1271. RUTTI *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 100 P. 3d 394.

No. 04–1308. FLEISCHLI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 376 F. 3d 709.

No. 04–8841. O'GARA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 239 App. Div. 2d 215, 657 N. Y. S. 2d 661.

No. 04–8843. SANCHO *v.* RAMIREZ ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–8844. SMITH *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 509.

No. 04–8846. REDDEN *v.* RAFFERTY, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 04–8847. MOONEY *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 266 Ga. App. 587, 597 S. E. 2d 589.

No. 04–8848. DUARTE *v.* SNEDEKER, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 04–8853. CURTIS *v.* TURPIN, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 278 Ga. 698, 606 S. E. 2d 244.

No. 04–8857. TOWNE *v.* FARWELL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 873.

No. 04–8858. YOUNG *v.* SULLIVAN, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–8859. WANSING *v.* SMELSER, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 27.

No. 04–8860. CASTILLO *v.* SPAIN ET AL. C. A. 5th Cir. Certiorari denied.

No. 04–8866. BEENE *v.* TERHUNE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 380 F. 3d 1149.

No. 04–8874. KWANG-WEI HAN *v.* RYAN ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–8875. HILL *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 361 S. C. 297, 604 S. E. 2d 696.

No. 04–8880. GATES *v.* WYNDER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 116 Fed. Appx. 340.

No. 04–8882. GROOMS *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 96.

No. 04–8883. HUNSINGER *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 04–8884. GARDNER *v.* WYNDER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–8885. TAYLOR *v.* TEXAS. Ct. App. Tex., 8th Dist. Certiorari denied.

No. 04–8886. WASHINGTON *v.* AMERICAN DRUG STORES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 119 Fed. Appx. 3.

No. 04–8890. JOHNSON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–8895. ESHAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 04–8897. LAMAR-HOGAN *v.* GEORGIA DEPARTMENT OF LABOR. Super. Ct. Hancock County, Ga. Certiorari denied.

No. 04–8907. BINGHAM *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–8910. APPLEBY *v.* BUTLER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–8913. DULANEY *v.* TONEY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 343.

No. 04–8914. KING *v.* OHIO. C. A. 6th Cir. Certiorari denied.

No. 04–8918. MILLS *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 348 Ill. App. 3d 1099, 868 N. E. 2d 1104.

No. 04–8922. DANIEL *v.* FISCHER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–8926. TYRELL *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 8 App. Div. 3d 685, 778 N. Y. S. 2d 887.

No. 04–8928. WOLFGANG *v.* CHESNEY, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT RETREAT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–8929. WALKER *v.* BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 385 F. 3d 321.

No. 04–8931. CERVANTE *v.* PITCHER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–8936. WALLS *v.* SECURITY ENFORCEMENT BUREAU OF NEW YORK, INC., ET AL. C. A. 4th Cir. Certiorari denied.

No. 04–8941. JOHNSON *v.* FATKIN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 999.

No. 04–8943. JONES *v.* TEXAS. Ct. App. Tex., 5th Dist. Certiorari denied.

No. 04–8944. SLOANE *v.* PORTUONDO, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–8948. EYAJAN *v.* SMITH ET AL. Ct. App. Ohio, Ashtabula County. Certiorari denied.

No. 04–8952. SUMBRY *v.* SHARP ET AL. C. A. D. C. Cir. Certiorari denied.

No. 04–8953. RAY *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 372 N. J. Super. 496, 859 A. 2d 738.

No. 04–8955. REDDEN *v.* RAFFERTY, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–8964. MITCHELL *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 886 So. 2d 704.

No. 04–8968. KEELING *v.* SHANNON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FRACKVILLE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–8977. WATERS *v.* SCHWARTZ, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–8978. DJAP *v.* GONZALES, ATTORNEY GENERAL. C. A. 10th Cir. Certiorari denied. Reported below: 113 Fed. Appx. 376.

No. 04–8981. COOK *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 789.

No. 04–8988. WILLIAMS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 897 So. 2d 1246.

No. 04–8997. MCBANE *v.* REILLY, NASSAU COUNTY CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 114 Fed. Appx. 42.

No. 04–9016. VAN HOEF *v.* BUREAU OF IMMIGRATION AND CUSTOMS ENFORCEMENT. C. A. 4th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 624.

No. 04–9026. ADAMS *v.* TREON, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 243.

No. 04–9031. MARCUS *v.* NICHOLSON, SECRETARY OF VETERANS AFFAIRS. C. A. 7th Cir. Certiorari denied.

No. 04–9041. CHRISTAKIS *v.* MCMAHON. C. A. 1st Cir. Certiorari denied.

No. 04–9045. BRITO-DE FIGUEROA ET AL. *v.* GONZALES, ATTORNEY GENERAL. C. A. 1st Cir. Certiorari denied. Reported below: 113 Fed. Appx. 413.

No. 04–9078. GAYNOR *v.* KYLER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON. C. A. 3d Cir. Certiorari denied.

No. 04–9096. STEFFEN *v.* CAREY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–9120. COLEMAN *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 871 So. 2d 1280.

No. 04–9134. JOHNSON *v.* EMERSON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 740.

No. 04–9144. PARKS *v.* UNITED STATES; and
No. 04–9508. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 119 Fed. Appx. 593.

No. 04–9160. CAMP *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 04–9164. JACKSON *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 32 Kan. App. 2d xxvi, 88 P. 3d 260.

No. 04–9175. BURDETTE *v.* MCBRIDE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 926.

No. 04–9177. P. S. *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 324 Mont. 327, 102 P. 3d 1225.

No. 04–9181. WHITE *v.* SHANNON, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT FRACKVILLE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–9182. WESTLEY *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 04–9192. LOPEZ *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–9227. MCCLELLAN *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–9231. REID *v.* FISCHER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–9237. WOMACK *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 888 So. 2d 220.

No. 04–9238. JOHNSON *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 124 Fed. Appx. 640.

No. 04–9250. PETERSEN *v.* HILL, SUPERINTENDENT, SNAKE RIVER CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied.

No. 04–9252. TRIGONES *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied.

No. 04–9269. HOLLIHAN *v.* SOBINA, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SOMERSET, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–9291. MORGAN *v.* LENSING, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 04–9311. BUSH *v.* SOBINA, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SOMERSET, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–9320. PERSON *v.* DOTSON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 927.

No. 04–9324. MOORER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 383 F. 3d 164.

No. 04–9336. BOWEN *v.* CITY OF LOS ANGELES, CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 04–9366. GALDAMEZ *v.* FISCHER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 394 F. 3d 68.

No. 04–9380. WHIGHAM *v.* CITY OF SAN FRANCISCO, CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 04–9403. HUBANKS *v.* FRANK, SECRETARY, WISCONSIN DEPARTMENT OF CORRECTIONS. C. A. 7th Cir. Certiorari denied. Reported below: 392 F. 3d 926.

No. 04–9428. CLARK *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 891 So. 2d 136.

No. 04–9434. RICE *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 100 P. 3d 371.

No. 04–9443. SAID ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 122 Fed. Appx. 608.

No. 04–9476. CUTBIRTH *v.* WYOMING DEPARTMENT OF CORRECTIONS ET AL. Sup. Ct. Wyo. Certiorari denied.

No. 04–9486. BROWN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–9492. TAYLOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 493.

No. 04–9495. CARBAJAL-DEPAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–9497. VOLIS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 4.

No. 04–9499. ATHANASIADES *v.* EDELMAN. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 347 Ill. App. 3d 1098, 867 N. E. 2d 114.

No. 04–9500. BRAMWELL *v.* COMPTON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 299.

No. 04–9501. BENETIZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–9504. PICKENS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–9514. RIVAS-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 120 Fed. Appx. 533.

No. 04–9520. LASSITER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 102 Fed. Appx. 831.

No. 04–9521. MILLIGAN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 127 Fed. Appx. 471.

No. 04–9522. PINKSTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 126 Fed. Appx. 537.

No. 04–9525. JACKSON-BEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 762.

No. 04–9526. BALLARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 119 Fed. Appx. 447.

No. 04–9527. SANDERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 362.

No. 04–9529. MCKENITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–9536. ROBINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 389 F. 3d 582.

No. 04–9551. SANCHEZ, AKA ALBINO, AKA RODRIGUEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 389 F. 3d 271.

No. 04–9558. BECERRA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 03–1510. UNITED STATES *v.* INGRAM. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 342 F. 3d 89.

No. 04–1000. UNUM LIFE INSURANCE COMPANY OF AMERICA *v.* FOUGHT. C. A. 10th Cir. Motion of America's Health Insur-

ance Plans et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 379 F. 3d 997.

No. 04–1056. EMC MORTGAGE CORP. *v.* STARK ET UX. C. A. 8th Cir. Motion of Chamber of Commerce of the United States of America et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 381 F. 3d 793.

No. 04–1233. BUTLER ET AL. *v.* FEDERAL AVIATION ADMINISTRATION. C. A. D. C. Cir. Motion of AGE60Tule.com (Samuel D. Woolsey) for leave to file a brief as *amicus curiae* denied. Certiorari denied. Reported below: 109 Fed. Appx. 438.

No. 04–8854. BUTTS *v.* CHERRY, SUPERINTENDENT, HAMPTON ROADS REGIONAL JAIL, ET AL. C. A. 4th Cir. Certiorari before judgment denied.

*Rehearing Denied*

No. 04–766. LAMERS DAIRY, INC. *v.* DEPARTMENT OF AGRICULTURE, *ante*, p. 904;

No. 04–7400. STEVENSON *v.* BOYETTE, SUPERINTENDENT, NASH CORRECTIONAL INSTITUTION, 543 U. S. 1126;

No. 04–7555. COVEY *v.* NATURAL FOODS, INC., 543 U. S. 1158;

No. 04–7640. WOOTEN *v.* ST. FRANCIS MEDICAL CENTER, 543 U. S. 1161;

No. 04–7687. TOMOSON *v.* MORGAN, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY, 543 U. S. 1163;

No. 04–7714. MCGRAW *v.* CAIN, WARDEN, 543 U. S. 1164;

No. 04–7733. JABAAY *v.* JABAAY ET AL., 543 U. S. 1164;

No. 04–7753. SIMMONS *v.* MALONE ET AL., 543 U. S. 1165;

No. 04–7887. MCDANIEL *v.* CRIST, ATTORNEY GENERAL OF FLORIDA, ET AL., *ante*, p. 906;

No. 04–8002. VALLE *v.* GEORGIA DEPARTMENT OF CORRECTIONS, 543 U. S. 1191;

No. 04–8003. HURST *v.* TRW, INC., *ante*, p. 909;

No. 04–8123. HASTINGS *v.* UNITED STATES, 543 U. S. 1174;

No. 04–8202. GRICCO *v.* UNITED STATES, 543 U. S. 1175;

No. 04–8284. LEACH *v.* OHIO, *ante*, p. 930;

No. 04–8377. POGGEMILLER *v.* UNITED STATES, *ante*, p. 911; and

No. 04–8555. ADAMSON *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, *ante*, p. 913. Petitions for rehearing denied.

MAY 3, 2005

*Certiorari Denied*

No. 04–9938 (04A927). PURSLEY *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

MAY 5, 2005

*Certiorari Denied*

No. 04–9966 (04A940). RICHMOND *v.* NORTH CAROLINA. Sup. Ct. N. C. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied.

MAY 12, 2005

*Miscellaneous Orders*

No. 04A964. ZIEMBA *v.* RELL ET AL. Application for stay of execution of sentence of death, presented to JUSTICE GINSBURG, and by her referred to the Court, denied.

No. 04–10068 (04A961). IN RE MILLER. Application for stay of execution of sentence of death, presented to JUSTICE BREYER, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

*Certiorari Denied*

No. 04–1518 (04A965). ROSS, BY HIS NEXT FRIEND, DUNHAM *v.* LANTZ, COMMISSIONER, CONNECTICUT DEPARTMENT OF CORRECTION, ET AL. C. A. 2d Cir. Application for stay of execution of sentence of death, presented to JUSTICE GINSBURG, and by her referred to the Court, denied. Motion for leave to proceed on 8½- by 11-inch paper granted. Certiorari denied. Reported below: 408 F. 3d 121.

MAY 16, 2005

*Certiorari Granted—Vacated and Remanded*

No. 04–914. FLORIDA *v.* RABB. Dist. Ct. App. Fla., 4th Dist. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Illinois* v. *Caballes*, 543 U. S. 405 (2005). Reported below: 881 So. 2d 587.

No. 04–1094. NUNEZ *v.* UNITED STATES. C. A. 11th Cir. Reported below: 116 Fed. Appx. 252;

No. 04–1316. MONCRIEF *v.* UNITED STATES. C. A. 5th Cir. Reported below: 133 Fed. Appx. 924;

No. 04–1325. MCELWEE *v.* UNITED STATES. C. A. 9th Cir. Reported below: 115 Fed. Appx. 412;

No. 04–1331. FLETCHER *v.* UNITED STATES. C. A. 4th Cir. Reported below: 113 Fed. Appx. 545; and

No. 04–1364. BROOKS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 738. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Booker*, 543 U. S. 220 (2005).

No. 04–7979. QUINTANA-PEREZ *v.* UNITED STATES. C. A. 1st Cir. Reported below: 117 Fed. Appx. 773;

No. 04–8308. SANDOVAL-QUINONES *v.* UNITED STATES. C. A. 5th Cir. Reported below: 111 Fed. Appx. 325;

No. 04–8576. CARDONA *v.* UNITED STATES. C. A. 11th Cir. Reported below: 125 Fed. Appx. 269;

No. 04–9496. WASHINGTON *v.* UNITED STATES. C. A. 6th Cir. Reported below: 134 Fed. Appx. 797;

No. 04–9502. CUNNINGHAM *v.* UNITED STATES. C. A. 5th Cir. Reported below: 117 Fed. Appx. 373;

No. 04–9509. GRAVENHORST *v.* UNITED STATES. C. A. 1st Cir. Reported below: 377 F. 3d 49;

No. 04–9515. ROGERS *v.* UNITED STATES. C. A. 4th Cir. Reported below: 118 Fed. Appx. 669;

No. 04–9540. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Reported below: 118 Fed. Appx. 772;

No. 04–9547. WASHINGTON *v.* UNITED STATES. C. A. 5th Cir. Reported below: 115 Fed. Appx. 205;

No. 04–9549. SANCHEZ-VILLAR *v.* UNITED STATES. C. A. 2d Cir. Reported below: 99 Fed. Appx. 256;

No. 04–9550. LACHNEY *v.* UNITED STATES. C. A. 5th Cir. Reported below: 119 Fed. Appx. 640;

No. 04–9552. WATKINS *v.* UNITED STATES. C. A. 8th Cir. Reported below: 113 Fed. Appx. 720;

No. 04–9555. COGGINS *v.* UNITED STATES. C. A. 1st Cir.;

No. 04–9563. HERNDON *v.* UNITED STATES. C. A. 6th Cir. Reported below: 393 F. 3d 665;

No. 04–9568. HANSEN *v.* UNITED STATES. C. A. 11th Cir.;

No. 04–9569. HOOF *v.* UNITED STATES. C. A. 5th Cir. Reported below: 119 Fed. Appx. 603;

No. 04–9576. PENNYWELL *v.* UNITED STATES. C. A. 5th Cir. Reported below: 119 Fed. Appx. 653;

No. 04–9601. MYERS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 108 Fed. Appx. 937;

No. 04–9603. MESSANO *v.* UNITED STATES. C. A. 9th Cir. Reported below: 114 Fed. Appx. 785;

No. 04–9620. BRANCH *v.* UNITED STATES. C. A. 3d Cir. Reported below: 120 Fed. Appx. 920;

No. 04–9665. NAZARIO *v.* UNITED STATES. C. A. 11th Cir.;

No. 04–9701. MCGHEE *v.* UNITED STATES. C. A. 11th Cir. Reported below: 125 Fed. Appx. 975; and

No. 04–9754. MCLERAN *v.* UNITED STATES. C. A. 11th Cir. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Booker*, 543 U. S. 220 (2005).

*Certiorari Dismissed*

No. 04–9055. SOSA *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 04–9056. SOSA *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

*Miscellaneous Orders*

No. 04M70. EVANS *v.* SCOTT; and

No. 04M71. JOINTER *v.* POTTER, POSTMASTER GENERAL, ET AL. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. 03–1693. MCCREARY COUNTY, KENTUCKY, ET AL. *v.* AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY ET AL. C. A. 6th Cir. [Certiorari granted, 543 U. S. 924.] Motion of petitioners for leave to file supplemental brief after argument granted.

No. 04–623. GONZALES, ATTORNEY GENERAL, ET AL. *v.* OREGON ET AL. C. A. 9th Cir. [Certiorari granted, 543 U. S. 1145.] Motion of the Acting Solicitor General to dispense with printing the joint appendix granted.

No. 04–881. LOCKHART *v.* UNITED STATES ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 998.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 04–9646. IN RE MILES;
No. 04–9685. IN RE TAYLOR;
No. 04–9704. IN RE BENNETT;
No. 04–9715. IN RE PEDRAZA;
No. 04–9763. IN RE UNDERWOOD; and
No. 04–9786. IN RE BELLAVIA. Petitions for writs of habeas corpus denied.

No. 04–1182. IN RE COOPER INDUSTRIES, INC.;
No. 04–1320. IN RE PELTIER ET AL.;
No. 04–9162. IN RE LUCZAK;
No. 04–9681. IN RE WOODRUFF; and
No. 04–9719. IN RE DEUTSCH. Petitions for writs of mandamus denied.

*Certiorari Granted*

No. 04–944. ARBAUGH *v.* Y & H CORP., DBA THE MOONLIGHT CAFE. C. A. 5th Cir. Certiorari granted. Reported below: 380 F. 3d 219.

No. 04–1203. UNITED STATES *v.* GEORGIA ET AL.; and
No. 04–1236. GOODMAN *v.* GEORGIA ET AL. C. A. 11th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 120 Fed. Appx. 785.

*Certiorari Denied*

No. 04–923. MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC. *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 374 F. 3d 1123.

No. 04–951. ENGLISH *v.* BURT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–1038. SINGH *v.* GONZALES, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 112 Fed. Appx. 868.

No. 04–1127. PREMIERE GLOBAL SERVICES, INC., FKA PREMIERE TECHNOLOGIES, INC., ET AL. *v.* APA EXCELSIOR III L. P. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 122 Fed. Appx. 985.

No. 04–1134. METRISH, WARDEN *v.* HATCHETT. C. A. 6th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 34.

No. 04–1169. WHEATLEY ET AL. *v.* WICOMICO COUNTY, MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 390 F. 3d 328.

No. 04–1171. ST. JUDE MEDICAL, INC., ET AL. *v.* CARDIAC PACEMAKERS, INC., ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 381 F. 3d 1371.

No. 04–1178. HOUSTON *v.* ARAMARK CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 112 Fed. Appx. 132.

No. 04–1180. DUGAS *v.* CLARON CORP. C. A. 5th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 674.

No. 04–1181. COASTAL SALVADORAN POWER LTD. ET AL. *v.* CRYSTAL POWER CO. C. A. 5th Cir. Certiorari denied.

No. 04–1189. WOOD *v.* APPELLATE DIVISION, SUPERIOR COURT OF CALIFORNIA, ALAMEDA COUNTY. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 04–1193. GOLDS *v.* GOLDS. Ct. App. N. C. Certiorari denied. Reported below: 164 N. C. App. 227, 595 S. E. 2d 455.

No. 04–1197. PRESCOTT ET AL. *v.* LITTLE SIX, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 387 F. 3d 753.

No. 04–1199. UNITED STATES EX REL. TOTTEN *v.* BOMBARDIER CORP. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 380 F. 3d 488.

No. 04–1202. UNITED STATES EX REL. GAY ET AL. *v.* LINCOLN TECHNICAL INSTITUTE INC. C. A. 5th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 286.

No. 04–1205. CLANCY *v.* AT&T CORP.; and CLANCY *v.* COMCAST CORP. ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 04–1206. CAROLAN *v.* CARDIFF UNIVERSITY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 113 Fed. Appx. 193.

No. 04–1209. POLITZER *v.* SALOMON SMITH BARNEY, INC. C. A. 9th Cir. Certiorari denied. Reported below: 113 Fed. Appx. 845.

No. 04–1211. FLOYD *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 103 Fed. Appx. 793.

No. 04–1220. OSBURN *v.* ATLANTA CENTER FOR DERMATOLOGIC DISEASES ET AL. Ct. App. Ga. Certiorari denied. Reported below: 269 Ga. App. 303, 603 S. E. 2d 695.

No. 04–1229. SVERDLIN, INDIVIDUALLY AND DERIVATIVELY ON BEHALF OF AUTOMATED MARINE PROPULSION SYSTEMS, INC. *v.* SWANK ET AL. Ct. App. Tex., 1st Dist. Certiorari denied. Reported below: 121 S. W. 3d 785.

No. 04–1232. QUINN *v.* PHILIPS MEDICAL SYSTEMS, INC., ET AL. C. A. 1st Cir. Certiorari denied.

No. 04–1241. SILVER SPUR RESERVE, A CALIFORNIA GENERAL PARTNERSHIP, DBA SILVER SPUR MOBILE MANOR *v.* CITY OF PALM DESERT, CALIFORNIA, ET AL. Ct. App. Cal., 4th App. Dist., Div. 2. Certiorari denied.

No. 04–1242. SOUTH CAROLINA DEPARTMENT OF CORRECTIONS *v.* SLEZAK. Sup. Ct. S. C. Certiorari denied. Reported below: 361 S. C. 327, 605 S. E. 2d 506.

No. 04–1243. SMITH ET AL. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 110 Fed. Appx. 898.

No. 04–1248. BELLECOURT ET AL. *v.* CITY OF CLEVELAND, OHIO, ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 104 Ohio St. 3d 439, 820 N. E. 2d 309.

No. 04–1258. CONNOR, EXECUTOR OF THE ESTATE OF HANLON *v.* LEAVITT, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 3d Cir. Certiorari denied. Reported below: 112 Fed. Appx. 864.

No. 04–1274. DIAZ FLORES *v.* GONZALES, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 418.

No. 04–1290. EDWARDS *v.* DEPARTMENT OF EDUCATION. C. A. 10th Cir. Certiorari denied.

No. 04–1294. KERN ET AL. *v.* SIEMENS CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 393 F. 3d 120.

No. 04–1296. CORRIGAN *v.* WASHINGTON. Super. Ct. Wash., Adams County. Certiorari denied.

No. 04–1306. MOLLINGER-WILSON ET VIR *v.* QUIZNO'S FRANCHISE CO. C. A. 10th Cir. Certiorari denied. Reported below: 122 Fed. Appx. 917.

No. 04–1307. MANOKEY *v.* WATERS, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 390 F. 3d 767.

No. 04–1319. MELTON, INDIVIDUALLY AND AS NEXT FRIEND OF HIS SON, MELTON, ET AL. *v.* DALLAS AREA RAPID TRANSIT. C. A. 5th Cir. Certiorari denied. Reported below: 391 F. 3d 669.

No. 04–1323. CONNERS *v.* NEW YORK COMMISSIONER OF LABOR. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 9 App. Div. 3d 703, 779 N. Y. S. 2d 827.

No. 04–1337. PEARSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–1373. COUTO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 119 Fed. Appx. 345.

No. 04–1378. O'KEEFE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 119 Fed. Appx. 589.

No. 04–1388. VALENCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 394 F. 3d 352.

No. 04–6794. GUTIERREZ *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied. Reported below: 85 S. W. 3d 446.

No. 04–7514. DAVIS ET AL. *v.* UNITED STATES CONGRESS. C. A. D. C. Cir. Certiorari denied. Reported below: 101 Fed. Appx. 838.

No. 04–7808. DAVIS *v.* UNITED STATES; and
No. 04–8171. HARDY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 380 F. 3d 821.

No. 04–7944. ADEFEMI *v.* GONZALES, ATTORNEY GENERAL, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 386 F. 3d 1022.

No. 04–8018. CLAY *v.* ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 367 F. 3d 993.

No. 04–8198. ALLEMAN *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 04–8292. BAUM *v.* SOUTH CAROLINA. Ct. App. S. C. Certiorari denied. Reported below: 355 S. C. 209, 584 S. E. 2d 419.

No. 04–8310. RAMIREZ-ROBLES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 386 F. 3d 1234.

No. 04–8569. MATHENEY *v.* DAVIS, SUPERINTENDENT, INDIANA STATE PRISON. C. A. 7th Cir. Certiorari denied. Reported below: 377 F. 3d 740.

No. 04–8973. VAUGHN *v.* TEXAS; and VAUGHN *v.* COURT OF APPEALS OF TEXAS, SEVENTH DISTRICT. Ct. Crim. App. Tex. Certiorari denied.

No. 04–8974. TOINES *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–8975. VINNING-EL *v.* WALLS, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 04–8984. LENOIR *v.* TIMMERMAN-COOPER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–8985. MILLER *v.* MCDANIEL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 787.

No. 04–8989. VORA *v.* STRASSBURGER, MCKENNA, MESSER, SHILOBOD & GUTNICK. C. A. 3d Cir. Certiorari denied. Reported below: 95 Fed. Appx. 463.

No. 04–8995. RIVERA *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–9000. LUCAS *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 04–9006. MAPP *v.* TEXAS. Ct. App. Tex., 1st Dist. Certiorari denied.

No. 04–9008. MISIAK *v.* KIMBERLY. Ct. App. Wash. Certiorari denied.

No. 04–9009. PEASE *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 04–9010. TARVER *v.* VALADEZ, ACTING WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 339.

No. 04–9017. THOMAS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–9018. WITHERSPOON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–9019. WILLIAMS *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON. C. A. 9th Cir. Certiorari denied.

No. 04–9023. BASCOM *v.* FRIED ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 116 Fed. Appx. 300.

No. 04–9025. ALLEN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–9030. MENDOZA *v.* LANE ET AL. Ct. App. Cal., 4th App. Dist., Div. 1. Certiorari denied.

No. 04–9036. SMITH *v.* HURLEY, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–9038. DOYLE *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 125 Fed. Appx. 762.

No. 04–9043. BELL *v.* UNKNOWN OFFICER ET AL. C. A. 6th Cir. Certiorari denied.

No. 04–9048. RAYMER *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 04–9049. ROSE *v.* BERNAD ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–9050. SOSA *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–9053. HICKS *v.* COLLINS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 384 F. 3d 204.

No. 04–9057. CRITTENDEN *v.* GARZA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 906.

No. 04–9058. SCHLUETER *v.* WYNDER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 384 F. 3d 69.

No. 04–9062. CASTILLO *v.* HUBERT ET AL. C. A. 5th Cir. Certiorari denied.

No. 04–9065. MACARTHUR *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–9067. WOLFE *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 487.

No. 04–9071. PELLETIER *v.* COLEMAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 119 Fed. Appx. 545.

No. 04–9077. COVINGTON *v.* ARTUS, SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–9080. DONAHOU *v.* DONAHOU. Ct. Civ. App. Okla. Certiorari denied.

No. 04–9081. CRAWFORD ET UX. *v.* LUSTIG ET AL. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 346 Ill. App. 3d 1189, 866 N. E. 2d 717.

No. 04–9086. HOLLIS *v.* ROBINSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–9089. HEBERT *v.* CAIN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 04–9090. GEORGESON *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 04–9091. HORNE *v.* SMITH, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 04–9092. FALKIEWICZ *v.* GRAYSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 110 Fed. Appx. 491.

No. 04–9093. RICHARDSON *v.* RICHARDSON ET AL. C. A. 4th Cir. Certiorari denied.

No. 04–9101. OCEAN *v.* CUNNINGHAM, SUPERINTENDENT, WOODBOURNE CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 120 Fed. Appx. 392.

No. 04–9103. NATURALITE *v.* PEPPLER ET AL. C. A. 6th Cir. Certiorari denied.

No. 04–9104. P. G. B. *v.* FLORIDA DEPARTMENT OF CHILDREN AND FAMILIES ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 910 So. 2d 262.

No. 04–9110. HICKS *v.* HINSLEY, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 04–9118. DAVIS *v.* TEXAS. Ct. App. Tex., 2d Dist. Certiorari denied.

No. 04–9123. FALU *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–9124. SAAVEDRA HERNANDEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–9125. GREEN *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 114 Fed. Appx. 47.

No. 04–9129. TEMPLE *v.* OCONEE COUNTY MEMORIAL HOSPITAL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 106 Fed. Appx. 864.

No. 04–9130. SANDERS *v.* CHICAGO & NORTHWESTERN RAILROAD CO. ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 343 Ill. App. 3d 1298, 856 N. E. 2d 694.

No. 04–9141. JACKSON *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 359 Ark. 297, 197 S. W. 3d 468.

No. 04–9143. LANIOHAN *v.* KNOWLES, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 888.

No. 04–9145. MUNAWWAR *v.* WOODWEST REALTY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 04–9148. FREDRICK *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 583.

No. 04–9149. GARNETT *v.* GOLDER, WARDEN. Sup. Ct. Colo. Certiorari denied.

No. 04–9153. ACOSTA GALLEGOS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–9155. GONZALES *v.* LIEBERMAN, JUDGE, COURT OF COMMON PLEAS OF PENNSYLVANIA, BERKS COUNTY. Sup. Ct. Pa. Certiorari denied.

No. 04–9158. COX *v.* BENEDETTI ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 939.

No. 04–9159. CEARC *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 884 So. 2d 942.

No. 04–9168. BEASLEY *v.* CLARKE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 333.

No. 04–9176. ALLISON *v.* FICCO, SUPERINTENDENT, SOUZA-BARANOWSKI CORRECTIONAL CENTER, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 388 F. 3d 367.

No. 04–9180. WOODS *v.* RENICO, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–9183. WILSON *v.* CAREY, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–9184. DARDEN *v.* PERALTA COMMUNITY COLLEGE DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 938.

No. 04–9195. FRIGO *v.* STEINER. Ct. App. Ohio, Richland County. Certiorari denied.

No. 04–9197. HOWARD *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 04–9200. HOLDEN ET VIR *v.* SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES. Ct. App. S. C. Certiorari denied.

No. 04–9213. MCSWAIN *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 04–9220. WOODARD *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–9305. VARGAS *v.* HALL, WARDEN. Sup. Ct. Ga. Certiorari denied. Reported below: 278 Ga. 868, 608 S. E. 2d 200.

No. 04–9360. ALLEN *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–9378. WARFIELD *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. Reported below: 694 N. W. 2d 721.

No. 04–9396. ADAMS *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 103 Ohio St. 3d 508, 817 N. E. 2d 29.

No. 04–9420. JACKSON *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 279.

No. 04–9430. JONES *v.* HASKE. C. A. 6th Cir. Certiorari denied.

No. 04–9438. MCKINNEY *v.* KING ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–9452. BALLENTINE *v.* ILLINOIS STATE POLICE. C. A. 7th Cir. Certiorari denied. Reported below: 126 Fed. Appx. 307.

No. 04–9462. ELLIBEE *v.* HAZLETT ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 122 Fed. Appx. 932.

No. 04–9467. PARLE *v.* RUNNELS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 387 F. 3d 1030.

No. 04–9505. MORGAN *v.* WALSH, SUPERINTENDENT, SULLIVAN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 120 Fed. Appx. 389.

No. 04–9548. WALL *v.* NORTH CAROLINA. Gen. Ct. Justice, Super. Ct. Div., Craven County, N. C. Certiorari denied.

No. 04–9562. SHEWMAKER GONZALES, AKA GONZALES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 388 F. 3d 1199.

No. 04–9564. FERRO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 127 Fed. Appx. 472.

No. 04–9565. HUMMINGWAY, AKA GOLDENSTEIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 879.

No. 04–9566. GRINARD-HENRY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 399 F. 3d 1294.

No. 04–9579. KEMPER *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 10th Cir. Certiorari denied. Reported below: 118 Fed. Appx. 360.

No. 04–9580. KNICKMEIER *v.* OFFICE OF LAWYER REGULATION. Sup. Ct. Wis. Certiorari denied. Reported below: 275 Wis. 2d 69, 683 N. W. 2d 445.

No. 04–9586. PATRICK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 119 Fed. Appx. 385.

No. 04–9587. RODRIGUEZ-RODRIGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 393 F. 3d 849.

No. 04–9592. LEUSCHEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 395 F. 3d 155.

No. 04–9597. ZAMORA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–9600. MCCOULLUM *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 04–9604. McCRAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 113 Fed. Appx. 770.

No. 04–9610. JOINER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 123 Fed. Appx. 681.

No. 04–9611. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–9617. THROPAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 394 F. 3d 1004.

No. 04–9624. BROWN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–9626. BERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 118 Fed. Appx. 744.

No. 04–9628. EMERY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–9635. STEVENSON *v.* PETTIFORD, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 104 Fed. Appx. 441.

No. 04–9636. STRATTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–9644. THOMPSON *v.* CHOINSKI, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–9650. DALEY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–9656. MARTINEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 120 Fed. Appx. 386.

No. 04–9659. HAWKINS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–9660. CARPENTER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 403 F. 3d 9.

No. 04–9663. HUGGINS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 979.

No. 04–9667. HARGROVE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 04–9669. FOX *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 119 Fed. Appx. 142.

No. 04–9670. BLOM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–9672. HOWARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 394 F. 3d 582.

No. 04–9673. GOFORTH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 04–9674. FERNANDEZ ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 388 F. 3d 1199.

No. 04–9676. SINGLETARY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 123 Fed. Appx. 387.

No. 04–9683. VOELKER *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 04–9687. CHASE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 120 Fed. Appx. 676.

No. 04–9694. BERGER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 119 Fed. Appx. 658.

No. 04–9697. BERRIOS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 120 Fed. Appx. 218.

No. 04–9700. PARKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 142 Fed. Appx. 19.

No. 04–9717. CROSS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 04–9738. RIVERA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 04–9752. FRANK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 126 Fed. Appx. 462.

No. 04–9753. HERRICK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 118 Fed. Appx. 339.

No. 04–900. BP WEST COAST PRODUCTS LLC ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.; and

No. 04–903. SFPP, L. P. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of these petitions. Reported below: 374 F. 3d 1263.

No. 04–971. SERRA CANYON CO., LTD. *v.* CALIFORNIA COASTAL COMMISSION ET AL. Ct. App. Cal., 2d App. Dist. Motion of California Association of Realtors for leave to file a brief as *amicus curiae* out of time denied. Certiorari denied. Reported below: 120 Cal. App. 4th 663, 16 Cal. Rptr. 3d 110.

No. 04–995. MERCK & CO., INC., ET AL. *v.* EPPS-MALLOY. C. A. 3d Cir. Certiorari denied. JUSTICE O'CONNOR and JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 384 F. 3d 58.

No. 04–1047. WARNER-LAMBERT CO. ET AL. *v.* WAKEFIELD, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE, TRUSTEE, AND EXECUTOR OF THE ESTATE OF WAKEFIELD ET AL. Ct. Civ. App. Okla. Motions of Chamber of Commerce of the United States of America et al. and Pharmaceutical Research and Manufacturers for leave to file briefs as *amici curiae* granted. Certiorari denied.

No. 04–1054. BALTIMORE CITY DEPARTMENT OF SOCIAL SERVICES *v.* TERESA B. Ct. App. Md. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 383 Md. 240, 858 A. 2d 1007.

No. 04–1198. ALEXANDER ET AL. *v.* OKLAHOMA ET AL. C. A. 10th Cir. Motion of Professional Historians for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 382 F. 3d 1206.

No. 04–1246. BESSINGER ET AL. *v.* FOOD LION, LLC, ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 115 Fed. Appx. 636.

No. 04–1255. UZAN ET AL. *v.* MOTOROLA CREDIT CORP. ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 388 F. 3d 39 and 115 Fed. Appx. 473.

No. 04–1339. LEONARDO'S PIZZA BY THE SLICE, INC., ET AL. *v.* WAL-MART STORES, INC., ET AL. C. A. 2d Cir. Certiorari

denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 396 F. 3d 96.

No. 04–9068. WOODARD *v.* SUNDSTRAND CORP. C. A. 7th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 110 Fed. Appx. 706.

No. 04–9623. BAILEY *v.* O'BRIEN, WARDEN. C. A. 6th Cir. Certiorari before judgment denied.

*Rehearing Denied*

No. 03–1039. BROWN, WARDEN *v.* PAYTON, *ante*, p. 133;

No. 04–932. MENDONCA *v.* SUPREME JUDICIAL COURT OF MASSACHUSETTS ET AL., *ante*, p. 921;

No. 04–953. WABEKE *v.* MULDER ET AL., *ante*, p. 922;

No. 04–1111. GABALDON *v.* UNITED STATES, *ante*, p. 923;

No. 04–7523. RICHARDSON *v.* FEDERAL BUREAU OF INVESTIGATION, 543 U. S. 1158;

No. 04–7764. FEIST *v.* BERG ET AL., 543 U. S. 1166;

No. 04–7891. ADI *v.* PRUDENTIAL PROPERTY & CASUALTY INSURANCE CO. ET AL., 543 U. S. 1190;

No. 04–7961. WOOTEN *v.* CALIFORNIA, *ante*, p. 908;

No. 04–8111. KEYS *v.* UNITED STATES, 543 U. S. 1173;

No. 04–8120. GRIFFIN *v.* UNITED STATES ET AL., 543 U. S. 1174;

No. 04–8132. WATTS *v.* FLORIDA COMMISSION ON HUMAN RELATIONS, 543 U. S. 1191;

No. 04–8144. FISHER *v.* COPELAND, JUDGE, CIRCUIT COURT OF MISSOURI, 34TH CIRCUIT, 543 U. S. 1174;

No. 04–8186. SHAFER *v.* OHIO, *ante*, p. 928;

No. 04–8188. SEDGWICK *v.* UNITED STATES, *ante*, p. 928;

No. 04–8219. SCALES *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 950;

No. 04–8260. IN RE BELL-OUTLAW, *ante*, p. 947;

No. 04–8287. WOLFE *v.* MAHLE; WOLFE *v.* SACRAMENTO COUNTY, CALIFORNIA, ET AL.; and WOLFE *v.* SACRAMENTO COUNTY BAR ASSN. ET AL., *ante*, p. 951;

No. 04–8351. RUTHERFORD *v.* UNITED STATES, 543 U. S. 1192;

No. 04–8400. WILLIAMS *v.* UNITED STATES, 543 U. S. 1193;

No. 04–8416. FISHER *v.* GAMMON, SUPERINTENDENT, MOBERLY CORRECTIONAL CENTER, *ante*, p. 931;

No. 04–8450. STEVENSON *v.* LEWIS, WARDEN, *ante*, p. 932;

No. 04–8638. IN SOO CHUN *v.* BUSH, FORMER PRESIDENT OF THE UNITED STATES, ET AL., *ante*, p. 943; and

No. 04–8786. BROWN *v.* UNITED STATES, *ante*, p. 936. Petitions for rehearing denied.

MAY 18, 2005

*Dismissal Under Rule 46*

No. 04–8831. MCNEILL *v.* CURRIE ET AL. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 112 Fed. Appx. 924.

*Miscellaneous Order*

No. 04A977 (04–10180). BROWN *v.* CRAWFORD, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 8th Cir. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Temporary stay heretofore entered is vacated. JUSTICE SOUTER would grant the application for stay of execution.

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

Because the State has not disputed the merits of petitioner's challenge to the chemical protocol used by Missouri to carry out lethal injections, I would grant the stay for the reasons stated in Judge Bye's dissenting opinion. 408 F. 3d 1027 (CA8 2005). Assuming the Prison Litigation Reform Act of 1995 applies, see 94 Stat. 352, as amended, 42 U. S. C. § 1997e(a), the State conceded at oral argument before the District Court that there is no available remedy that the petitioner has failed to invoke.

*Certiorari Denied*

No. 04–9596 (04A935). BROWN *v.* MISSOURI. Sup. Ct. Mo. Application for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

No. 04–10165 (04A972). BROWN *v.* CRAWFORD, DIRECTOR, MISSOURI DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. Mo. Ap-

plication for stay of execution of sentence of death, presented to JUSTICE THOMAS, and by him referred to the Court, denied. Certiorari denied.

MAY 19, 2005

*Certiorari Denied*

No. 04–10199 (04A982). CARTWRIGHT *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

MAY 23, 2005

*Certiorari Granted—Vacated and Remanded*

No. 04–9585. MENDOZA-SALINAS *v.* UNITED STATES. C. A. 5th Cir. Reported below: 119 Fed. Appx. 637;

No. 04–9633. RODRIGUEZ-GUTIERREZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 119 Fed. Appx. 681;

No. 04–9648. SERVANCE *v.* UNITED STATES. C. A. 4th Cir. Reported below: 394 F. 3d 222;

No. 04–9655. HALE *v.* UNITED STATES. C. A. 5th Cir. Reported below: 119 Fed. Appx. 656;

No. 04–9666. HARTMAN *v.* UNITED STATES. C. A. 3d Cir. Reported below: 117 Fed. Appx. 829;

No. 04–9675. LIRA-LOPEZ *v.* UNITED STATES. C. A. 5th Cir. Reported below: 114 Fed. Appx. 643;

No. 04–9698. BAUTISTA *v.* UNITED STATES. C. A. 3d Cir. Reported below: 101 Fed. Appx. 888; and

No. 04–9781. GARCIA-SAUZA *v.* UNITED STATES. C. A. 11th Cir. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Booker*, 543 U. S. 220 (2005).

*Certiorari Dismissed*

No. 04–9185. COOMBS *v.* PENNSYLVANIA. Super. Ct. Pa. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 833 A. 2d 1143.

No. 04–9201. REED *v.* YUMA COUNTY, ARIZONA, ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pau-*

*peris* denied, and certiorari dismissed. See this Court's Rule 39.8.

*Miscellaneous Orders*

No. 04M72. ALAI *v.* EDUCATIONAL MANAGEMENT CORP. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 04–9561. GATES *v.* DISCOVERY COMMUNICATIONS INC. ET AL. Sup. Ct. Cal. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until June 13, 2005, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 04–9775. IN RE ANDERSON;
No. 04–9836. IN RE BRAVO;
No. 04–9845. IN RE WOOD; and
No. 04–9849. IN RE WILLIAMS. Petitions for writs of habeas corpus denied.

*Certiorari Granted*

No. 04–1144. AYOTTE, ATTORNEY GENERAL OF NEW HAMPSHIRE *v.* PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND ET AL. C. A. 1st Cir. Certiorari granted. Reported below: 390 F. 3d 53.

*Certiorari Denied*

No. 04–978. D. A. S. SAND & GRAVEL, INC. *v.* CHAO, SECRETARY OF LABOR, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 386 F. 3d 460.

No. 04–1057. MCKENZIE *v.* BENTON, SHERIFF, NATRONA COUNTY, WYOMING. C. A. 10th Cir. Certiorari denied. Reported below: 388 F. 3d 1342.

No. 04–1114. CITY OF SEQUIM, WASHINGTON, ET AL. *v.* JOHNSON. C. A. 9th Cir. Certiorari denied. Reported below: 388 F. 3d 676.

No. 04–1157. ODOM ET AL. *v.* YANG ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 392 F. 3d 97.

No. 04–1162. RICOH ELECTRONICS, INC. *v.* HALUCK ET AL. Ct. App. Cal., 4th App. Dist., Div. 3. Certiorari denied.

No. 04–1183. OVERSTREET *v.* LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT CIVIL SERVICE COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 813.

No. 04–1237. SAMS *v.* HOECHST AKTIENGESELLSCHAFT ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 391 F. 3d 812.

No. 04–1250. ST. PAUL ALBANIAN CATHOLIC COMMUNITY *v.* MAIDA ET AL. Ct. App. Mich. Certiorari denied.

No. 04–1253. ACKERMAN ET AL. *v.* EDWARDS ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 121 Cal. App. 4th 946, 17 Cal. Rptr. 3d 517.

No. 04–1259. METRONET SERVICES CORP. *v.* QWEST CORP. C. A. 9th Cir. Certiorari denied. Reported below: 383 F. 3d 1124.

No. 04–1260. CITY OF PORTLAND, OREGON *v.* QWEST CORP. C. A. 9th Cir. Certiorari denied. Reported below: 385 F. 3d 1236.

No. 04–1268. PARKS, INDIVIDUALLY AND AS TRUSTEE FOR THE HEIRS AND NEXT OF KIN OF PARKS *v.* POMEROY. C. A. 8th Cir. Certiorari denied. Reported below: 387 F. 3d 949.

No. 04–1269. RELFORD *v.* LEXINGTON-FAYETTE URBAN COUNTY GOVERNMENT. C. A. 6th Cir. Certiorari denied. Reported below: 390 F. 3d 452.

No. 04–1273. YOUNGER *v.* YOUNGER. Ct. Sp. App. Md. Certiorari denied. Reported below: 158 Md. App. 730.

No. 04–1279. KAPLAN *v.* KAGAN. App. Ct. Mass. Certiorari denied. Reported below: 61 Mass. App. 1103, 807 N. E. 2d 862.

No. 04–1285. FALCONE *v.* UNIVERSITY OF MINNESOTA. C. A. 8th Cir. Certiorari denied. Reported below: 388 F. 3d 656.

No. 04–1289. MORRISON *v.* WARREN ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 375 F. 3d 468.

No. 04–1295. AVENAL ET AL. *v.* LOUISIANA ET AL. Sup. Ct. La. Certiorari denied. Reported below: 886 So. 2d 1085.

No. 04–1301. D. L., INDIVIDUALLY, AS NEXT FRIEND OF J. L., AND AS ADMINISTRATRIX OF ESTATE OF R. L., ET AL. *v.* UNIFIED SCHOOL DISTRICT NO. 497, DOUGLAS COUNTY, KANSAS, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 392 F. 3d 1223.

No. 04–1302. KAHN ET AL. *v.* GONZALES, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 117 Fed. Appx. 302.

No. 04–1313. SCOTT *v.* DEPARTMENT OF THE ARMY. C. A. Fed. Cir. Certiorari denied. Reported below: 115 Fed. Appx. 440.

No. 04–1321. TUCKER *v.* CITY OF RICHMOND, KENTUCKY, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 388 F. 3d 216.

No. 04–1344. PAYNE ET UX. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 847.

No. 04–1391. AMIRMOKRI *v.* BODMAN, SECRETARY OF ENERGY. C. A. 4th Cir. Certiorari denied. Reported below: 119 Fed. Appx. 520.

No. 04–1403. MARKARIAN ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 385 F. 3d 1187.

No. 04–1412. WEINER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 389 F. 3d 152.

No. 04–1425. MORGAN *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 04–7583. COLEMAN *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 83 Conn. App. 672, 851 A. 2d 329.

No. 04–9136. RAYMOND *v.* GIURBINO, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 907.

No. 04–9188. DEBOSE *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 884 So. 2d 42.

No. 04–9190. WOODS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 152 S. W. 3d 105.

No. 04–9193. GARRETT *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–9194. GARRETT *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–9198. HUNTER *v.* LOCKYER, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–9202. SHEPPARD *v.* BEDINGFIELD, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 04–9207. ROWE *v.* ROBERT HALF INTERNATIONAL, INC., ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–9214. OGUNSALU *v.* NAIR ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 117 Fed. Appx. 522.

No. 04–9219. WEAVER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 894 So. 2d 178.

No. 04–9221. DUNLAP *v.* HATHAWAY, JUDGE, CIRCUIT COURT OF MICHIGAN, THIRD CIRCUIT. Ct. App. Mich. Certiorari denied.

No. 04–9222. ESPRITT *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–9223. GLOVER *v.* TEXAS BOARD OF PARDONS AND PAROLES. C. A. 5th Cir. Certiorari denied.

No. 04–9228. CUMMINGS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 351 Ill. App. 3d 343, 813 N. E. 2d 1004.

No. 04–9229. SAUNDERS *v.* CITY OF PETERSBURG POLICE DEPARTMENT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 108 Fed. Appx. 102.

No. 04–9232. SALINAS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–9235. THOMPSON *v.* YATES, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–9241. JOSEPH *v.* AYERS, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 116 Fed. Appx. 166.

No. 04–9242. JONES *v.* SHERMAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–9243. SMITH *v.* STEGALL, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 385 F. 3d 993.

No. 04–9249. CARMICHAEL *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 888 So. 2d 626.

No. 04–9253. WENYING ZHOU *v.* SUN MICROSYSTEMS, INC. C. A. 9th Cir. Certiorari denied.

No. 04–9255. BELL *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 359 N. C. 1, 603 S. E. 2d 93.

No. 04–9256. BARNES *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–9258. BROTHERS *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–9262. ALLEN *v.* FORD CREDIT. C. A. 4th Cir. Certiorari denied. Reported below: 117 Fed. Appx. 261.

No. 04–9263. ALLEN *v.* IVEYS. C. A. 4th Cir. Certiorari denied. Reported below: 117 Fed. Appx. 260.

No. 04–9264. MANLEY *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied.

No. 04–9283. STILLEY *v.* GALAZA, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 120 Fed. Appx. 683.

No. 04–9284. SALLAHDIN, AKA PENNINGTON *v.* MULLIN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 380 F. 3d 1242.

No. 04–9290. KING *v.* THOMAS, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 04–9322. LEARY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 303 App. Div. 2d 256, 756 N. Y. S. 2d 205.

No. 04–9323. JONES *v.* SALEEBY ET AL. C. A. 4th Cir. Certiorari denied.

No. 04–9326. SCELZI *v.* BECKER & POLIAKOFF ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 888 So. 2d 649.

No. 04–9328. LEE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 04–9332. BINNS *v.* HOUSING AUTHORITY OF THE COUNTY OF COOK. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 346 Ill. App. 3d 1168, 866 N. E. 2d 708.

No. 04–9333. BAR-JONAH *v.* MONTANA. Sup. Ct. Mont. Certiorari denied. Reported below: 324 Mont. 278, 102 P. 3d 1229.

No. 04–9335. ADAMS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 04–9337. STERLING *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 117 Fed. Appx. 328.

No. 04–9341. ROACH *v.* MAXEY ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 113 Fed. Appx. 558.

No. 04–9342. SINGLETON *v.* FISCHER, SUPERINTENDENT, SING SING CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–9343. STAKEY *v.* PASKETT, WARDEN, ET AL. Ct. App. Idaho. Certiorari denied. Reported below: 142 Idaho 96, 123 P. 3d 729.

No. 04–9344. SHOEMAKER *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 894 So. 2d 250.

No. 04–9346. RANGEL *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–9347. PLCH *v.* COPLAN, WARDEN. C. A. 1st Cir. Certiorari denied.

No. 04–9359. DENNIS *v.* GONZALES, ATTORNEY GENERAL, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 115 Fed. Appx. 600.

No. 04–9422. MORRIS *v.* NICHOLSON, SECRETARY OF VETERANS AFFAIRS. C. A. Fed. Cir. Certiorari denied. Reported below: 122 Fed. Appx. 473.

No. 04–9431. LICARI *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 04–9456. AWIIS *v.* PORTER, SUPERINTENDENT, WASHINGTON CORRECTIONS CENTER. C. A. 9th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 596.

No. 04–9458. ARIAS *v.* GONZALES, ATTORNEY GENERAL. C. A. 9th Cir. Certiorari denied.

No. 04–9460. SIERRA *v.* LAFLER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–9468. PHILLIPS *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 5th Cir. Certiorari denied. Reported below: 113 Fed. Appx. 644.

No. 04–9532. WALLAGER *v.* MCKEE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 04–9572. DAVIS *v.* JOHNSON, SUPERINTENDENT, ORLEANS CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 125 Fed. Appx. 353.

No. 04–9606. PUNGINA *v.* MCGREEVEY, FORMER GOVERNOR OF NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied.

No. 04–9609. LASH *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied.

No. 04–9616. KNOWLIN *v.* BENIK, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 04–9618. TORRES *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied.

No. 04–9629. DIAZ-CRISPIN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 04–9688. MOORER *v.* MERISTAR FOR MARRIOTT ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 119 Fed. Appx. 180.

No. 04–9689. WILSON *v.* HUBBARD, SUPERINTENDENT, MCCAIN CORRECTIONAL HOSPITAL. C. A. 4th Cir. Certiorari denied. Reported below: 119 Fed. Appx. 547.

No. 04–9703. BARKLEY *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 849 A. 2d 601.

No. 04–9726. RODRIGUEZ-VILLARREAL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–9729. ROBINSON *v.* ARKANSAS. Ct. App. Ark. Certiorari denied.

No. 04–9742. JACKSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 125 Fed. Appx. 975.

No. 04–9749. ABIMBOLA-AMOO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 390 F. 3d 937.

No. 04–9750. BRONSHTEIN *v.* BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–9764. TURPIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–9767. PULLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 119 Fed. Appx. 504.

No. 04–9769. BOONE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 120 Fed. Appx. 491.

No. 04–9771. SHERMAN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 870 A. 2d 1207.

No. 04–9774. ANDERSON *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 04–9777. MOORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–9780. FINCH *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 867 A. 2d 222.

No. 04–9782. FLORES-GUZMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 121 Fed. Appx. 557.

No. 04–9787. BLOUNT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 04–9797. HOBEREK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 04–9810. MARTIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–9811. JAMES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–9816. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 04–9831. STAPLE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–9833. BURTON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 121 Fed. Appx. 318.

No. 04–9834. ADEMAJ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 04–9835. BARBOSA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 112 Fed. Appx. 868.

No. 04–9846. WHAB *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 04–9852. WELLS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 111 Fed. Appx. 832.

No. 04–872. KUCERA ET AL. *v.* BRADBURY, SECRETARY OF STATE OF OREGON, ET AL. Sup. Ct. Ore. Certiorari denied. JUSTICE BREYER would grant the petition for writ of certiorari. Reported below: 337 Ore. 384, 97 P. 3d 1191.

No. 04–1282. TIEN FU HSU ET AL. *v.* COUNTY OF CLARK, NEVADA. Sup. Ct. Nev. Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 120 Nev. 1228, 131 P. 3d 591.

No. 04–1283. FINCH *v.* GALAWAY, ADMINISTRATOR, ON BEHALF OF ESTATE OF GALAWAY. C. A. 5th Cir. Motion of Guardian Life Insurance Company of America for leave to file a brief as *amicus curiae* out of time denied. Certiorari denied. Reported below: 395 F. 3d 238.

No. 04–9329. AVERY *v.* REED, SUPERINTENDENT, MANNING CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari before judgment denied.

*Rehearing Denied*

No. 03–855. CITY OF SHERRILL, NEW YORK *v.* ONEIDA INDIAN NATION OF NEW YORK ET AL., *ante*, p. 197;

No. 03–6270. CABRERA *v.* UNITED STATES, 541 U. S. 1064;

No. 03–10261. LEGRAND *v.* LOUISIANA, *ante*, p. 947;

No. 04–1014. IN RE LEONICHEV ET AL., *ante*, p. 960;

No. 04–5337. SANTOS *v.* UNITED STATES, 543 U. S. 1122;

No. 04–7743. HOWZE *v.* YARBOROUGH, WARDEN, ET AL., 543 U. S. 1165;

No. 04–7783. HOLLOWAY *v.* HAMLET, WARDEN, 543 U. S. 1166;

No. 04–7861. ALVARADO-RIVERA *v.* UNITED STATES, 543 U. S. 1167;

No. 04–8012. GELMAN *v.* PHILLIPS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY, ET AL., 543 U. S. 1171;

No. 04–8017. COOK *v.* CABANA, *ante*, p. 909;

No. 04–8048. EPPERSON *v.* DELAWARE, *ante*, p. 924;

No. 04–8137. COLIDA *v.* KYOCERA WIRELESS CORP., *ante*, p. 927;

No. 04–8346. TILLMAN *v.* SCHOFIELD, WARDEN, *ante*, p. 952;

No. 04–8408. ROWLAND *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., *ante*, p. 931;

No. 04–8419. GRIMES *v.* FOWLER ET AL., *ante*, p. 931;

No. 04–8435. DONALDSON *v.* CENTRAL MICHIGAN UNIVERSITY ET AL., *ante*, p. 932;

No. 04–8486. WALLACE *v.* YWCA OF CHEMUNG COUNTY ET AL., *ante*, p. 965;

No. 04–8532. BROWN *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL., *ante*, p. 932;

No. 04–8607. IACULLO *v.* UNITED STATES, *ante*, p. 934;

No. 04–8712. CURTO *v.* CORNELL UNIVERSITY COLLEGE OF VETERINARY MEDICINE ET AL., *ante*, p. 935;

No. 04–9015. WINGO *v.* UNITED STATES, *ante*, p. 968; and

No. 04–9147. IN RE MCQUIRTER, *ante*, p. 960. Petitions for rehearing denied.

No. 03–7922. HARRIS *v.* UNITED STATES, 540 U. S. 1156;

No. 04–6006. DAMES *v.* UNITED STATES, 543 U. S. 1057; and

No. 04–6014. BURNS *v.* UNITED STATES, 543 U. S. 1123. Motions for leave to file petitions for rehearing denied.

MAY 24, 2005

*Miscellaneous Order*

No. 04–10284 (04A992). IN RE JOHNSON. Application for stay of execution of sentence of death, presented to JUSTICE STEVENS, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

MAY 31, 2005

*Certiorari Granted—Vacated and Remanded*

No. 03–1043. MICHIGAN PORK PRODUCERS ASSN., INC., ET AL. *v.* CAMPAIGN FOR FAMILY FARMS ET AL. C. A. 6th Cir. Reported below: 348 F. 3d 157;

No. 03–1180. JOHANNS, SECRETARY OF AGRICULTURE, ET AL. *v.* CAMPAIGN FOR FAMILY FARMS ET AL. C. A. 6th Cir. Reported below: 348 F. 3d 157;

No. 04–23. LANDRENEAU, SECRETARY FOR THE LOUISIANA DEPARTMENT OF WILDLIFE AND FISHERIES *v.* PELTS & SKINS, LLC. C. A. 5th Cir. Reported below: 365 F. 3d 423;

No. 04–166. LOVELL ET AL. *v.* COCHRAN ET UX. C. A. 3d Cir. Reported below: 359 F. 3d 263; and

No. 04–446. JOHANNS, SECRETARY OF AGRICULTURE, ET AL. *v.* COCHRAN ET UX. C. A. 3d Cir. Reported below: 359 F. 3d 263. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *Johanns* v. *Livestock Marketing Assn.*, *ante*, p. 550.

No. 04–1345. ARNOLD *v.* UNITED STATES. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Booker*, 543 U. S. 220 (2005). Reported below: 125 Fed. Appx. 269.

No. 04–9776. SPRINGS *v.* UNITED STATES. C. A. 6th Cir. Reported below: 105 Fed. Appx. 811;

No. 04–9799. FLORENTINO *v.* UNITED STATES. C. A. 1st Cir. Reported below: 385 F. 3d 60;

No. 04–9800. HARRIS *v.* UNITED STATES. C. A. 4th Cir. Reported below: 109 Fed. Appx. 583;

No. 04–9844. VELASCO-ORTEGA *v.* UNITED STATES; MARTINEZ-GONZALEZ *v.* UNITED STATES; LUA-GUTIERREZ *v.* UNITED STATES; MADRIGAL-REFUGIO *v.* UNITED STATES; and GUERRERO-HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir.;

No. 04–9850. MILES *v.* UNITED STATES. C. A. 6th Cir. Reported below: 116 Fed. Appx. 646; and

No. 04–9932. BYRD *v.* UNITED STATES. C. A. 11th Cir. Reported below: 126 Fed. Appx. 462. Motions of petitioners for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Booker*, 543 U. S. 220 (2005).

*Certiorari Dismissed*

No. 04–9351. MCBROOM *v.* TECHNEGLAS, INC., ET AL. Ct. App. Ohio, Franklin County. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

*Miscellaneous Orders*

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of the River Master for fees and expenses granted, and the River Master is awarded a total of $2,712 for the period January 1 through March 31, 2005, to be paid equally by the parties. [For earlier order herein, see, *e. g.*, 543 U. S. 805.]

No. 03–9168. SHEPARD *v.* UNITED STATES, *ante*, p. 13. Motion of counsel for petitioner for excess compensation denied.

No. 03–10198. HALBERT *v.* MICHIGAN. Ct. App. Mich. [Certiorari granted, 543 U. S. 1042.] Motion of petitioner for leave to file supplemental brief after argument granted.

No. 04–9939. IN RE LASEUR;

No. 04–9961. IN RE PRICE;

No. 04–9981. IN RE SCHEPIS; and

No. 04–10000. IN RE ADAMS. Petitions for writs of habeas corpus denied.

No. 04–9441. IN RE SHEA. Petition for writ of mandamus denied.

No. 04–9379. IN RE WRIGHT. Petition for writ of mandamus and/or prohibition denied.

*Certiorari Granted*

No. 04–1170. KANSAS *v.* MARSH. Sup. Ct. Kan. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. In addition to the question presented by the petition, the parties are directed to brief and argue the following questions: "Does this Court have jurisdiction to review the judgment of the Kansas Supreme Court under 28 U. S. C. § 1257, as construed by *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975)?"; "Was the Kansas Supreme Court's judgment adequately supported by a ground independent of federal law?" Reported below: 278 Kan. 520, 102 P. 3d 445.

*Certiorari Denied*

No. 04–279. MESSINA ET AL. *v.* PARISH OF ST. CHARLES, LOUISIANA, ET AL. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 865 So. 2d 158.

No. 04–854. HILL *v.* TEXAS. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 04–894. CZICHRAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 378 F. 3d 822.

No. 04–1130. SHARPE *v.* CONOLE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 386 F. 3d 482.

No. 04–1135. KOTTARAM *v.* BANK LEUMI, USA, ET AL. C. A. 2d Cir. Certiorari denied.

No. 04–1146. BUBNA *v.* ANCHORAGE EQUAL RIGHTS COMMISSION ET AL. Sup. Ct. Alaska. Certiorari denied. Reported below: 102 P. 3d 937.

No. 04–1275. DUNAGAN *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–1277. MARTHA GRAHAM SCHOOL & DANCE FOUNDATION, INC., ET AL. *v.* SPITZER, ATTORNEY GENERAL OF NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 380 F. 3d 624.

No. 04–1280. LAKESIDE EQUIPMENT CORP. *v.* TOWN OF CHESTER, VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: 177 Vt. 619, 865 A. 2d 422.

No. 04–1281. GRABACH ET UX. *v.* LARSSON FAMILY TRUST ET AL. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 121 Cal. App. 4th 1147, 18 Cal. Rptr. 3d 136.

No. 04–1284. GLOBAL NAPS, INC. *v.* VERIZON NEW ENGLAND, INC., ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 396 F. 3d 16.

No. 04–1288. NGOC NU TRINH *v.* MEDTRONIC, INC., ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–1293. LUALLEN *v.* GUILFORD HEALTH CARE CENTER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 167.

No. 04–1298. UNITEDHEALTH GROUP, INC., FKA UNITED HEALTHCARE CORP., ET AL. *v.* KLAY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 389 F. 3d 1191.

No. 04–1305. BALDADO *v.* HAWAII MANAGEMENT ALLIANCE ASSN. Sup. Ct. Haw. Certiorari denied. Reported below: 106 Haw. 21, 100 P. 3d 952.

No. 04–1309. SIBLEY *v.* RAMIREZ ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 129 Fed. Appx. 599.

No. 04–1310. CONWAY *v.* NUSBAUM, TRUSTEE FOR NUSBAUM. C. A. 6th Cir. Certiorari denied. Reported below: 109 Fed. Appx. 44.

No. 04–1326. JAFFE *v.* LANDESS. Sup. Ct. Va. Certiorari denied.

No. 04–1348. ROYAL *v.* REID. C. A. 8th Cir. Certiorari denied. Reported below: 375 F. 3d 720.

No. 04–1355. STANTON *v.* DISTRICT OF COLUMBIA COURT OF APPEALS. Ct. App. D. C. Certiorari denied. Reported below: 860 A. 2d 369.

No. 04–1356. CYRUS *v.* DEPARTMENT OF THE AIR FORCE. C. A. Fed. Cir. Certiorari denied. Reported below: 118 Fed. Appx. 513.

No. 04–1386. WOOLF *v.* MARY KAY INC. Ct. App. Tex., 5th Dist. Certiorari denied. Reported below: 146 S. W. 3d 813.

No. 04–1393. PORTER *v.* ASCENSION PARISH SCHOOL BOARD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 393 F. 3d 608.

No. 04–1399. FRANK *v.* HARRIS COUNTY, TEXAS. C. A. 5th Cir. Certiorari denied. Reported below: 118 Fed. Appx. 799.

No. 04–1417. BIRT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 120 Fed. Appx. 424.

No. 04–1418. WHITT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–1436. SHANK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 395 F. 3d 466.

No. 04–1437. SCHNEIDER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 395 F. 3d 78.

No. 04–1450. ANDERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 118 Fed. Appx. 805.

No. 04–6120. PEARL *v.* CASON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 858.

No. 04–7033. SNYDER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 893 So. 2d 488.

No. 04–7520. JAYNE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–7875. DUKE *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 99 P. 3d 928.

No. 04–7893. SOLACHE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 341 Ill. App. 3d 1112, 853 N. E. 2d 451.

No. 04–7910. DOSS *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 882 So. 2d 176.

No. 04–7940. SAMS *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 346 Ill. App. 3d 1194, 866 N. E. 2d 719.

No. 04–7990. HACKETT *v.* FOLINO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GREENE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 381 F. 3d 281.

No. 04–8288. VALENCIA *v.* KIRKLAND, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 107 Fed. Appx. 781.

No. 04–8324. FRAZIER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 387 F. 3d 1244.

No. 04–8536. LAMBERT *v.* BLACKWELL, ADMINISTRATOR, EDNA MAHAN CORRECTIONAL FACILITY FOR WOMEN, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 387 F. 3d 210.

No. 04–8614. STEPHANATOS *v.* NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 119 Fed. Appx. 428.

No. 04–8849. COFFMAN *v.* CALIFORNIA; and
No. 04–8889. MARLOW *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 34 Cal. 4th 1, 96 P. 3d 30.

No. 04–9259. HASKELL *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 04–9338. SANDOVAL *v.* BENTLEY ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–9353. METZLER *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 883 So. 2d 1004.

No. 04–9354. MEREDITH *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 888 So. 2d 652.

No. 04–9357. CRAFT *v.* WALLER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 04–9362. SMITH *v.* FRANK, SECRETARY, WISCONSIN DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied.

No. 04–9363. AVERY *v.* MICHIGAN. Cir. Ct. Antrim County, Mich. Certiorari denied.

No. 04–9368. GALANDREO *v.* PERLMAN, SUPERINTENDENT, MOHAWK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 115 Fed. Appx. 514.

No. 04–9370. ELLIS *v.* UDOVIC. C. A. 9th Cir. Certiorari denied.

No. 04–9371. CROSSLEY *v.* LOCKYER, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–9373. ENGLISH *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 353 Ill. App. 3d 337, 818 N. E. 2d 857.

No. 04–9375. THOMAS *v.* NEUMAN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 125 Fed. Appx. 975.

No. 04–9383. GEORGE *v.* SANDOVAL, ATTORNEY GENERAL OF NEVADA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–9386. FIGETAKIS *v.* CITY OF CUYAHOGA FALLS, OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 112 Fed. Appx. 393.

No. 04–9388. YANCEY *v.* JOHNSON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 114 Fed. Appx. 96.

No. 04–9392. NEWBERRY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 04–9399. BAILEY *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 04–9400. JALOMO LOPEZ *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–9405. KARLS *v.* CIRCUIT COURT OF WISCONSIN, DANE COUNTY, ET AL. Sup. Ct. Wis. Certiorari denied.

No. 04–9406. DAVIS *v.* PLILER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–9410. RAE *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–9415. MCNAIR *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 892 So. 2d 1013.

No. 04–9426. MATTHEWS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 04–9427. LOPEZ *v.* POOLE, SUPERINTENDENT, FIVE POINTS CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 114 Fed. Appx. 43.

No. 04–9432. SANDERS *v.* WAYNE COUNTY, MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 04–9435. STANDBERRY *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 906 So. 2d 1065.

No. 04–9440. SOSA *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 04–9442. CAGLEY *v.* DUNCAN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 122 Fed. Appx. 353.

No. 04–9448. COHEN *v.* BAKER, MAYOR OF THE CITY OF SAVANNAH, GEORGIA, ET AL. C. A. 11th Cir. Certiorari denied.

No. 04–9455. ARMSTRONG *v.* GRIGAS, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–9457. ALLEN *v.* MAXWELL-HODGES ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 127 Fed. Appx. 471.

No. 04–9464. COX *v.* PAPEZ ET AL. C. A. 9th Cir. Certiorari denied.

No. 04–9466. EZZARD *v.* REWIS, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 04–9469. COOKISH *v.* ROULEAU ET AL. C. A. 1st Cir. Certiorari denied.

No. 04–9471. BUNCH *v.* STALDER, SECRETARY, LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 04–9478. ESTRADA *v.* HAMLET, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 04–9485. RYAN *v.* CLARKE, DIRECTOR, NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES. C. A. 8th Cir. Certiorari denied. Reported below: 387 F. 3d 785.

No. 04–9506. MILLER *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 04–9530. RIDDLEY *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 04–9531. TOR *v.* GREENE, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 04–9537. OSIRIS *v.* BELLEQUE, SUPERINTENDENT, OREGON STATE PENITENTIARY. C. A. 9th Cir. Certiorari denied. Reported below: 121 Fed. Appx. 192.

No. 04–9554. COSSETTE *v.* DEPARTMENT OF AGRICULTURE. C. A. Fed. Cir. Certiorari denied. Reported below: 113 Fed. Appx. 398.

No. 04–9571. COLEMAN *v.* KORMAN, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 04–9608. BRACKETT *v.* KIRSHBAUM ET AL. Ct. App. Colo. Certiorari denied.

No. 04–9640. OKPOJU *v.* CHERTOFF, SECRETARY OF HOMELAND SECURITY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 302.

No. 04–9641. TAPIA *v.* WOODFORD, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 118 Fed. Appx. 189.

No. 04–9649. RANKIN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 896 So. 2d 21.

No. 04–9661. CARTER *v.* CONNECTICUT. App. Ct. Conn. Certiorari denied. Reported below: 84 Conn. App. 263, 853 A. 2d 565.

No. 04–9662. EVANS ET AL. *v.* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 118 Fed. Appx. 883.

No. 04–9668. FOSTER *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied.

No. 04–9695. ALLEN *v.* SOLOMON, SUPERINTENDENT, ODOM CORRECTIONAL INSTITUTION. C. A. 4th Cir. Certiorari denied. Reported below: 119 Fed. Appx. 548.

No. 04–9699. BAYLIFF *v.* NORTH CAROLINA ET AL. Ct. App. N. C. Certiorari denied.

No. 04–9705. RILEY *v.* SUPREME COURT OF LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 887 So. 2d 459.

No. 04–9741. LUEBBE *v.* BOOTH ET UX. Ct. App. Tex., 12th Dist. Certiorari denied.

No. 04–9818. TERRY *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 119 Fed. Appx. 542.

No. 04–9855. MOSES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 119 Fed. Appx. 357.

No. 04–9856. GUERRERO LOPEZ *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 115 Fed. Appx. 147.

No. 04–9861. BUCULEI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 117 Fed. Appx. 273.

No. 04–9866. CURRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 404 F. 3d 316.

No. 04–9868. REYES-HERNANDEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 04–9877. KLIMAWICZE *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 352 Ill. App. 3d 13, 815 N. E. 2d 760.

No. 04–9882. CATER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 123 Fed. Appx. 385.

No. 04–9884. CALLENDER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 04–9886. STEVENSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 396 F. 3d 538.

No. 04–9888. RAMOS-CARTAGENA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 04–9904. WARREN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 04–9911. CALDERON-BELTRAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 124 Fed. Appx. 223.

No. 04–9923. MANDEFRO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 122 Fed. Appx. 322.

No. 04–9934. MCNAIR, AKA SMITH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 532.

No. 04–9936. PAZ-AGUIRRE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 125 Fed. Appx. 597.

No. 04–9937. MIJARES-ANDRADE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 121 Fed. Appx. 570.

No. 04–9956. JACKSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 04–908. YARBOROUGH, WARDEN *v.* MAXWELL. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 113 Fed. Appx. 213.

No. 04–1299. STAJANO ET AL. *v.* UNITED TECHNOLOGIES CORP. ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 5 App. Div. 3d 260, 774 N. Y. S. 2d 490.

No. 04–7212. PLATA *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Motion of petitioner to stay further proceedings denied. Certiorari denied. Reported below: 111 Fed. Appx. 213.

*Rehearing Denied*

No. 04–1037. WILSON *v.* COLORADO, *ante*, p. 962;

No. 04–1087. SANDERS *v.* VINE, EXECUTRIX OF THE ESTATE OF SANDERS, *ante*, p. 962;

No. 04–1107. FOCUS MEDIA, INC. *v.* NATIONAL BROADCASTING CO., INC., ET AL., *ante*, p. 968;

No. 04–7997. BROWN, AKA WILLIAMS *v.* CARROLL, WARDEN, *ante*, p. 909;

No. 04–8222. NORTON *v.* TENNESSEE, *ante*, p. 929;

No. 04–8349. WILSON *v.* SUPERIOR COURT OF CALIFORNIA, PIMA COUNTY, ET AL., *ante*, p. 952;

No. 04–8462. MONTOYA *v.* FINN, WARDEN, *ante*, p. 964;

No. 04–8643. COLIDA *v.* QUALCOMM INC., *ante*, p. 983;

No. 04–8644. COLIDA *v.* SANYO NORTH AMERICA CORP., *ante*, p. 966;

No. 04–8646. CHARLES *v.* TEXAS, *ante*, p. 983; and

No. 04–8696. ZHANG *v.* APEX HOME & BUSINESS RENTALS, INC., *ante*, p. 985. Petitions for rehearing denied.

# RULES OF THE SUPREME COURT OF THE UNITED STATES

ADOPTED MARCH 14, 2005

EFFECTIVE MAY 2, 2005

The following are the Rules of the Supreme Court of the United States as revised on March 14, 2005. See *post*, p. 1072. The amended Rules became effective May 2, 2005, as provided in Rule 48, *post*, p. 1130.

For previous revisions of the Rules of the Supreme Court see 346 U. S. 949, 388 U. S. 931, 398 U. S. 1013, 445 U. S. 985, 493 U. S. 1099, 515 U. S. 1197, 519 U. S. 1161, 525 U. S. 1191, and 537 U. S. 1249.

## ORDER ADOPTING REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES

MONDAY, MARCH 14, 2005

IT IS ORDERED that the revised Rules of this Court, today approved by the Court and lodged with the Clerk, shall be effective May 2, 2005, and be printed as an appendix to the United States Reports.

IT IS FURTHER ORDERED that the Rules promulgated January 27, 2003, see 537 U. S. 1247, shall be rescinded as of May 1, 2005, and that the revised Rules shall govern all proceedings in cases commenced after that date and, to the extent feasible and just, cases then pending.

# RULES OF THE SUPREME COURT OF THE UNITED STATES

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# RULES OF THE SUPREME COURT OF THE UNITED STATES

ADOPTED MARCH 14, 2005—EFFECTIVE MAY 2, 2005

## PART I. THE COURT

### Rule 1. Clerk

1. The Clerk receives documents for filing with the Court and has authority to reject any submitted filing that does not comply with these Rules.

2. The Clerk maintains the Court's records and will not permit any of them to be removed from the Court building except as authorized by the Court. Any document filed with the Clerk and made a part of the Court's records may not thereafter be withdrawn from the official Court files. After the conclusion of proceedings in this Court, original records and documents transmitted to this Court by any other court will be returned to the court from which they were received.

3. Unless the Court or the Chief Justice orders otherwise, the Clerk's office is open from 9 a.m. to 5 p.m., Monday through Friday, except on federal legal holidays listed in 5 U. S. C. § 6103.

### Rule 2. Library

1. The Court's library is available for use by appropriate personnel of this Court, members of the Bar of this Court, Members of Congress and their legal staffs, and attorneys for the United States and for federal departments and agencies.

2. The library's hours are governed by regulations made by the Librarian with the approval of the Chief Justice or the Court.

3. Library books may not be removed from the Court building, except by a Justice or a member of a Justice's staff.

**Rule 3. Term**

The Court holds a continuous annual Term commencing on the first Monday in October and ending on the day before the first Monday in October of the following year. See 28 U. S. C. § 2. At the end of each Term, all cases pending on the docket are continued to the next Term.

**Rule 4. Sessions and Quorum**

1. Open sessions of the Court are held beginning at 10 a.m. on the first Monday in October of each year, and thereafter as announced by the Court. Unless it orders otherwise, the Court sits to hear arguments from 10 a.m. until noon and from 1 p.m. until 3 p.m.

2. Six Members of the Court constitute a quorum. See 28 U. S. C. § 1. In the absence of a quorum on any day appointed for holding a session of the Court, the Justices attending—or if no Justice is present, the Clerk or a Deputy Clerk—may announce that the Court will not meet until there is a quorum.

3. When appropriate, the Court will direct the Clerk or the Marshal to announce recesses.

## Part II. Attorneys and Counselors

**Rule 5. Admission to the Bar**

1. To qualify for admission to the Bar of this Court, an applicant must have been admitted to practice in the highest court of a State, Commonwealth, Territory or Possession, or the District of Columbia for a period of at least three years immediately before the date of application; must not have been the subject of any adverse disciplinary action pronounced or in effect during that 3-year period; and must appear to the Court to be of good moral and professional character.

2. Each applicant shall file with the Clerk (1) a certificate from the presiding judge, clerk, or other authorized official

of that court evidencing the applicant's admission to practice there and the applicant's current good standing, and (2) a completely executed copy of the form approved by this Court and furnished by the Clerk containing (a) the applicant's personal statement, and (b) the statement of two sponsors endorsing the correctness of the applicant's statement, stating that the applicant possesses all the qualifications required for admission, and affirming that the applicant is of good moral and professional character. Both sponsors must be members of the Bar of this Court who personally know, but are not related to, the applicant.

3. If the documents submitted demonstrate that the applicant possesses the necessary qualifications, and if the applicant has signed the oath or affirmation and paid the required fee, the Clerk will notify the applicant of acceptance by the Court as a member of the Bar and issue a certificate of admission. An applicant who so wishes may be admitted in open court on oral motion by a member of the Bar of this Court, provided that all other requirements for admission have been satisfied.

4. Each applicant shall sign the following oath or affirmation: I, ....., do solemnly swear (or affirm) that as an attorney and as a counselor of this Court, I will conduct myself uprightly and according to law, and that I will support the Constitution of the United States.

5. The fee for admission to the Bar and a certificate bearing the seal of the Court is $100, payable to the United States Supreme Court. The Marshal will deposit such fees in a separate fund to be disbursed by the Marshal at the direction of the Chief Justice for the costs of admissions, for the benefit of the Court and its Bar, and for related purposes.

6. The fee for a duplicate certificate of admission to the Bar bearing the seal of the Court is $15, and the fee for a certificate of good standing is $10, payable to the United States Supreme Court. The proceeds will be maintained by the Marshal as provided in paragraph 5 of this Rule.

**Rule 6. Argument *Pro Hac Vice***

1. An attorney not admitted to practice in the highest court of a State, Commonwealth, Territory or Possession, or the District of Columbia for the requisite three years, but otherwise eligible for admission to practice in this Court under Rule 5.1, may be permitted to argue *pro hac vice.*

2. An attorney qualified to practice in the courts of a foreign state may be permitted to argue *pro hac vice.*

3. Oral argument *pro hac vice* is allowed only on motion of the counsel of record for the party on whose behalf leave is requested. The motion shall state concisely the qualifications of the attorney who is to argue *pro hac vice.* It shall be filed with the Clerk, in the form required by Rule 21, no later than the date on which the respondent's or appellee's brief on the merits is due to be filed, and it shall be accompanied by proof of service as required by Rule 29.

**Rule 7. Prohibition Against Practice**

No employee of this Court shall practice as an attorney or counselor in any court or before any agency of government while employed by the Court; nor shall any person after leaving such employment participate in any professional capacity in any case pending before this Court or in any case being considered for filing in this Court, until two years have elapsed after separation; nor shall a former employee ever participate in any professional capacity in any case that was pending in this Court during the employee's tenure.

**Rule 8. Disbarment and Disciplinary Action**

1. Whenever a member of the Bar of this Court has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this Court, the Court will enter an order suspending that member from practice before this Court and affording the member an opportunity to show cause, within 40 days, why a disbarment order should not be entered. Upon response, or if no response is timely filed, the Court will enter an appropriate order.

2. After reasonable notice and an opportunity to show cause why disciplinary action should not be taken, and after a hearing if material facts are in dispute, the Court may take any appropriate disciplinary action against any attorney who is admitted to practice before it for conduct unbecoming a member of the Bar or for failure to comply with these Rules or any Rule or order of the Court.

### Rule 9. Appearance of Counsel

1. An attorney seeking to file a document in this Court in a representative capacity must first be admitted to practice before this Court as provided in Rule 5, except that admission to the Bar of this Court is not required for an attorney appointed under the Criminal Justice Act of 1964, see 18 U. S. C. § 3006A(d)(6), or under any other applicable federal statute. The attorney whose name, address, and telephone number appear on the cover of a document presented for filing is considered counsel of record, and a separate notice of appearance need not be filed. If the name of more than one attorney is shown on the cover of the document, the attorney who is counsel of record shall be clearly identified.

2. An attorney representing a party who will not be filing a document shall enter a separate notice of appearance as counsel of record indicating the name of the party represented. A separate notice of appearance shall also be entered whenever an attorney is substituted as counsel of record in a particular case.

## Part III. Jurisdiction on Writ of Certiorari

### Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

**Rule 11. Certiorari to a United States Court of Appeals Before Judgment**

A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court. See 28 U. S. C. § 2101(e).

**Rule 12. Review on Certiorari: How Sought; Parties**

1. Except as provided in paragraph 2 of this Rule, the petitioner shall file 40 copies of a petition for a writ of certiorari, prepared as required by Rule 33.1, and shall pay the Rule 38(a) docket fee.

2. A petitioner proceeding *in forma pauperis* under Rule 39 shall file an original and 10 copies of a petition for a writ of certiorari prepared as required by Rule 33.2, together with an original and 10 copies of the motion for leave to proceed *in forma pauperis*. A copy of the motion shall precede and be attached to each copy of the petition. An inmate confined in an institution, if proceeding *in forma pauperis* and not represented by counsel, need file only an original petition and motion.

3. Whether prepared under Rule 33.1 or Rule 33.2, the petition shall comply in all respects with Rule 14 and shall be submitted with proof of service as required by Rule 29. The case then will be placed on the docket. It is the petitioner's duty to notify all respondents promptly, on a form supplied by the Clerk, of the date of filing, the date the case was placed on the docket, and the docket number of the case. The notice shall be served as required by Rule 29.

4. Parties interested jointly, severally, or otherwise in a judgment may petition separately for a writ of certiorari; or any two or more may join in a petition. A party not shown on the petition as joined therein at the time the petition is filed may not later join in that petition. When two or more judgments are sought to be reviewed on a writ of certiorari to the same court and involve identical or closely related questions, a single petition for a writ of certiorari covering all the judgments suffices. A petition for a writ of certiorari may not be joined with any other pleading, except that any motion for leave to proceed *in forma pauperis* shall be attached.

5. No more than 30 days after a case has been placed on the docket, a respondent seeking to file a conditional cross-petition (*i. e.*, a cross-petition that otherwise would be untimely) shall file, with proof of service as required by Rule 29, 40 copies of the cross-petition prepared as required by Rule 33.1, except that a cross-petitioner proceeding *in forma pauperis* under Rule 39 shall comply with Rule 12.2. The cross-petition shall comply in all respects with this Rule and Rule 14, except that material already reproduced in the ap-

pendix to the opening petition need not be reproduced again. A cross-petitioning respondent shall pay the Rule 38(a) docket fee or submit a motion for leave to proceed *in forma pauperis.* The cover of the cross-petition shall indicate clearly that it is a conditional cross-petition. The cross-petition then will be placed on the docket, subject to the provisions of Rule 13.4. It is the cross-petitioner's duty to notify all cross-respondents promptly, on a form supplied by the Clerk, of the date of filing, the date the cross-petition was placed on the docket, and the docket number of the cross-petition. The notice shall be served as required by Rule 29. A cross-petition for a writ of certiorari may not be joined with any other pleading, except that any motion for leave to proceed *in forma pauperis* shall be attached. The time to file a conditional cross-petition will not be extended.

6. All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court, unless the petitioner notifies the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below have no interest in the outcome of the petition. A copy of such notice shall be served as required by Rule 29 on all parties to the proceeding below. A party noted as no longer interested may remain a party by notifying the Clerk promptly, with service on the other parties, of an intention to remain a party. All parties other than the petitioner are considered respondents, but any respondent who supports the position of a petitioner shall meet the petitioner's time schedule for filing documents, except that a response supporting the petition shall be filed within 20 days after the case is placed on the docket, and that time will not be extended. Parties who file no document will not qualify for any relief from this Court.

7. The clerk of the court having possession of the record shall keep it until notified by the Clerk of this Court to certify and transmit it. In any document filed with this Court, a party may cite or quote from the record, even if it has not been transmitted to this Court. When requested by the

Clerk of this Court to certify and transmit the record, or any part of it, the clerk of the court having possession of the record shall number the documents to be certified and shall transmit therewith a numbered list specifically identifying each document transmitted. If the record, or stipulated portions, have been printed for the use of the court below, that printed record, plus the proceedings in the court below, may be certified as the record unless one of the parties or the Clerk of this Court requests otherwise. The record may consist of certified copies, but if the lower court is of the view that original documents of any kind should be seen by this Court, that court may provide by order for the transport, safekeeping, and return of such originals.

**Rule 13. Review on Certiorari: Time for Petitioning**

1. Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals (including the United States Court of Appeals for the Armed Forces) is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

2. The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time. See, *e. g.*, 28 U. S. C. § 2101(c).

3. The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or *sua sponte* considers rehearing, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the

petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment.

4. A cross-petition for a writ of certiorari is timely when it is filed with the Clerk as provided in paragraphs 1, 3, and 5 of this Rule, or in Rule 12.5. However, a conditional cross-petition (which except for Rule 12.5 would be untimely) will not be granted unless another party's timely petition for a writ of certiorari is granted.

5. For good cause, a Justice may extend the time to file a petition for a writ of certiorari for a period not exceeding 60 days. An application to extend the time to file shall set out the basis for jurisdiction in this Court, identify the judgment sought to be reviewed, include a copy of the opinion and any order respecting rehearing, and set out specific reasons why an extension of time is justified. The application must be filed with the Clerk at least 10 days before the date the petition is due, except in extraordinary circumstances. For the time and manner of presenting the application, see Rules 21, 22, 30, and 33.2. An application to extend the time to file a petition for a writ of certiorari is not favored.

**Rule 14. Content of a Petition for a Writ of Certiorari**

1. A petition for a writ of certiorari shall contain, in the order indicated:

(a) The questions presented for review, expressed concisely in relation to the circumstances of the case, without unnecessary detail. The questions should be short and should not be argumentative or repetitive. If the petitioner or respondent is under a death sentence that may be affected by the disposition of the petition, the notation "capital case" shall precede the questions presented. The questions shall be set out on the first page following the cover, and no other information may appear on that page. The statement of any question presented is deemed to comprise every subsidiary question fairly included therein. Only the questions set out in the petition, or fairly included therein, will be considered by the Court.

(b) A list of all parties to the proceeding in the court whose judgment is sought to be reviewed (unless the caption of the case contains the names of all the parties), and a corporate disclosure statement as required by Rule 29.6.

(c) If the petition exceeds five pages, a table of contents and a table of cited authorities.

(d) Citations of the official and unofficial reports of the opinions and orders entered in the case by courts or administrative agencies.

(e) A concise statement of the basis for jurisdiction in this Court, showing:

(i) the date the judgment or order sought to be reviewed was entered (and, if applicable, a statement that the petition is filed under this Court's Rule 11);

(ii) the date of any order respecting rehearing, and the date and terms of any order granting an extension of time to file the petition for a writ of certiorari;

(iii) express reliance on Rule 12.5, when a cross-petition for a writ of certiorari is filed under that Rule, and the date of docketing of the petition for a writ of certiorari in connection with which the cross-petition is filed;

(iv) the statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question; and

(v) if applicable, a statement that the notifications required by Rule 29.4(b) or (c) have been made.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, set out verbatim with appropriate citation. If the provisions involved are lengthy, their citation alone suffices at this point, and their pertinent text shall be set out in the appendix referred to in subparagraph 1(i).

(g) A concise statement of the case setting out the facts material to consideration of the questions presented, and also containing the following:

(i) If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e. g.*, court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. When the portions of the record relied on under this subparagraph are voluminous, they shall be included in the appendix referred to in subparagraph 1(i).

(ii) If review of a judgment of a United States court of appeals is sought, the basis for federal jurisdiction in the court of first instance.

(h) A direct and concise argument amplifying the reasons relied on for allowance of the writ. See Rule 10.

(i) An appendix containing, in the order indicated:

(i) the opinions, orders, findings of fact, and conclusions of law, whether written or orally given and transcribed, entered in conjunction with the judgment sought to be reviewed;

(ii) any other relevant opinions, orders, findings of fact, and conclusions of law entered in the case by courts or administrative agencies, and, if reference thereto is necessary to ascertain the grounds of the judgment, of those in companion cases (each document shall include the caption showing the name of the issuing court or agency, the title and number of the case, and the date of entry);

(iii) any order on rehearing, including the caption showing the name of the issuing court, the title and number of the case, and the date of entry;

(iv) the judgment sought to be reviewed if the date of its entry is different from the date of the opinion or order required in sub-subparagraph (i) of this subparagraph;

(v) material required by subparagraphs 1(f) or 1(g)(i); and

(vi) any other material the petitioner believes essential to understand the petition.

If the material required by this subparagraph is voluminous, it may be presented in a separate volume or volumes with appropriate covers.

2. All contentions in support of a petition for a writ of certiorari shall be set out in the body of the petition, as provided in subparagraph 1(h) of this Rule. No separate brief in support of a petition for a writ of certiorari may be filed, and the Clerk will not file any petition for a writ of certiorari to which any supporting brief is annexed or appended.

3. A petition for a writ of certiorari should be stated briefly and in plain terms and may not exceed the page limitations specified in Rule 33.

4. The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition.

5. If the Clerk determines that a petition submitted timely and in good faith is in a form that does not comply with this Rule or with Rule 33 or Rule 34, the Clerk will return it with a letter indicating the deficiency. A corrected petition received no more than 60 days after the date of the Clerk's letter will be deemed timely.

**Rule 15. Briefs in Opposition; Reply Briefs; Supplemental Briefs**

1. A brief in opposition to a petition for a writ of certiorari may be filed by the respondent in any case, but is not manda-

tory except in a capital case, see Rule 14.1(a), or when ordered by the Court.

2. A brief in opposition should be stated briefly and in plain terms and may not exceed the page limitations specified in Rule 33. In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

3. Any brief in opposition shall be filed within 30 days after the case is placed on the docket, unless the time is extended by the Court or a Justice, or by the Clerk under Rule 30.4. Forty copies shall be filed, except that a respondent proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis*, a copy of which shall precede and be attached to each copy of the brief in opposition. If the petitioner is proceeding *in forma pauperis*, the respondent may file an original and 10 copies of a brief in opposition prepared as required by Rule 33.2. Whether prepared under Rule 33.1 or Rule 33.2, the brief in opposition shall comply with the requirements of Rule 24 governing a respondent's brief, except that no summary of the argument is required. A brief in opposition may not be joined with any other pleading, except that any motion for leave to proceed *in forma pauperis* shall be attached. The brief in opposition shall be served as required by Rule 29.

4. No motion by a respondent to dismiss a petition for a writ of certiorari may be filed. Any objections to the jurisdiction of the Court to grant a petition for a writ of certiorari shall be included in the brief in opposition.

5. The Clerk will distribute the petition to the Court for its consideration upon receiving an express waiver of the right to file a brief in opposition, or, if no waiver or brief in opposition is filed, upon the expiration of the time allowed for filing. If a brief in opposition is timely filed, the Clerk will distribute the petition, brief in opposition, and any reply brief to the Court for its consideration no less than 10 days after the brief in opposition is filed.

6. Any petitioner may file a reply brief addressed to new points raised in the brief in opposition, but distribution and consideration by the Court under paragraph 5 of this Rule will not be deferred pending its receipt. Forty copies shall be filed, except that a petitioner proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The reply brief shall be served as required by Rule 29.

7. If a cross-petition for a writ of certiorari has been docketed, distribution of both petitions will be deferred until the cross-petition is due for distribution under this Rule.

8. Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing. A supplemental brief shall be restricted to new matter and shall follow, insofar as applicable, the form for a brief in opposition prescribed by this Rule. Forty copies shall be filed, except that a party proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The supplemental brief shall be served as required by Rule 29.

### Rule 16. Disposition of a Petition for a Writ of Certiorari

1. After considering the documents distributed under Rule 15, the Court will enter an appropriate order. The order may be a summary disposition on the merits.

2. Whenever the Court grants a petition for a writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record and the court whose judgment is to be reviewed. The case then will be scheduled for briefing and oral argument. If the record has not previously been filed in this Court, the Clerk will request the clerk of the court having possession of the record to certify and transmit it. A formal writ will not issue unless specially directed.

3. Whenever the Court denies a petition for a writ of certiorari, the Clerk will prepare, sign, and enter an order to that effect and will notify forthwith counsel of record and the court whose judgment was sought to be reviewed. The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice.

## Part IV. Other Jurisdiction

### Rule 17. Procedure in an Original Action

1. This Rule applies only to an action invoking the Court's original jurisdiction under Article III of the Constitution of the United States. See also 28 U. S. C. § 1251 and U. S. Const., Amdt. 11. A petition for an extraordinary writ in aid of the Court's appellate jurisdiction shall be filed as provided in Rule 20.

2. The form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In other respects, those Rules and the Federal Rules of Evidence may be taken as guides.

3. The initial pleading shall be preceded by a motion for leave to file, and may be accompanied by a brief in support of the motion. Forty copies of each document shall be filed,

with proof of service. Service shall be as required by Rule 29, except that when an adverse party is a State, service shall be made on both the Governor and the Attorney General of that State.

4. The case will be placed on the docket when the motion for leave to file and the initial pleading are filed with the Clerk. The Rule 38(a) docket fee shall be paid at that time.

5. No more than 60 days after receiving the motion for leave to file and the initial pleading, an adverse party shall file 40 copies of any brief in opposition to the motion, with proof of service as required by Rule 29. The Clerk will distribute the filed documents to the Court for its consideration upon receiving an express waiver of the right to file a brief in opposition, or, if no waiver or brief is filed, upon the expiration of the time allowed for filing. If a brief in opposition is timely filed, the Clerk will distribute the filed documents to the Court for its consideration no less than 10 days after the brief in opposition is filed. A reply brief may be filed, but consideration of the case will not be deferred pending its receipt. The Court thereafter may grant or deny the motion, set it for oral argument, direct that additional documents be filed, or require that other proceedings be conducted.

6. A summons issued out of this Court shall be served on the defendant 60 days before the return day specified therein. If the defendant does not respond by the return day, the plaintiff may proceed *ex parte*.

7. Process against a State issued out of this Court shall be served on both the Governor and the Attorney General of that State.

### Rule 18. Appeal from a United States District Court

1. When a direct appeal from a decision of a United States district court is authorized by law, the appeal is commenced by filing a notice of appeal with the clerk of the district court within the time provided by law after entry of the judgment sought to be reviewed. The time to file may not be extended. The notice of appeal shall specify the parties taking

the appeal, designate the judgment, or part thereof, appealed from and the date of its entry, and specify the statute or statutes under which the appeal is taken. A copy of the notice of appeal shall be served on all parties to the proceeding as required by Rule 29, and proof of service shall be filed in the district court together with the notice of appeal.

2. All parties to the proceeding in the district court are deemed parties entitled to file documents in this Court, but a party having no interest in the outcome of the appeal may so notify the Clerk of this Court and shall serve a copy of the notice on all other parties. Parties interested jointly, severally, or otherwise in the judgment may appeal separately, or any two or more may join in an appeal. When two or more judgments involving identical or closely related questions are sought to be reviewed on appeal from the same court, a notice of appeal for each judgment shall be filed with the clerk of the district court, but a single jurisdictional statement covering all the judgments suffices. Parties who file no document will not qualify for any relief from this Court.

3. No more than 60 days after filing the notice of appeal in the district court, the appellant shall file 40 copies of a jurisdictional statement and shall pay the Rule 38 docket fee, except that an appellant proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis*, a copy of which shall precede and be attached to each copy of the jurisdictional statement. The jurisdictional statement shall follow, insofar as applicable, the form for a petition for a writ of certiorari prescribed by Rule 14, and shall be served as required by Rule 29. The case will then be placed on the docket. It is the appellant's duty to notify all appellees promptly, on a form supplied by the Clerk, of the date of filing, the date the case was placed on the docket, and the docket number of the case. The notice shall be served as required by Rule 29. The appendix shall include a copy of the notice of appeal showing the date

it was filed in the district court. For good cause, a Justice may extend the time to file a jurisdictional statement for a period not exceeding 60 days. An application to extend the time to file a jurisdictional statement shall set out the basis for jurisdiction in this Court; identify the judgment sought to be reviewed; include a copy of the opinion, any order respecting rehearing, and the notice of appeal; and set out specific reasons why an extension of time is justified. For the time and manner of presenting the application, see Rules 21, 22, and 30. An application to extend the time to file a jurisdictional statement is not favored.

4. No more than 30 days after a case has been placed on the docket, an appellee seeking to file a conditional cross-appeal (*i. e.*, a cross-appeal that otherwise would be untimely) shall file, with proof of service as required by Rule 29, a jurisdictional statement that complies in all respects (including number of copies filed) with paragraph 3 of this Rule, except that material already reproduced in the appendix to the opening jurisdictional statement need not be reproduced again. A cross-appealing appellee shall pay the Rule 38 docket fee or submit a motion for leave to proceed *in forma pauperis*. The cover of the cross-appeal shall indicate clearly that it is a conditional cross-appeal. The cross-appeal then will be placed on the docket. It is the cross-appellant's duty to notify all cross-appellees promptly, on a form supplied by the Clerk, of the date of filing, the date the cross-appeal was placed on the docket, and the docket number of the cross-appeal. The notice shall be served as required by Rule 29. A cross-appeal may not be joined with any other pleading, except that any motion for leave to proceed *in forma pauperis* shall be attached. The time to file a cross-appeal will not be extended.

5. After a notice of appeal has been filed in the district court, but before the case is placed on this Court's docket, the parties may dismiss the appeal by stipulation filed in the district court, or the district court may dismiss the appeal on the appellant's motion, with notice to all parties. If a notice of appeal has been filed, but the case has not been

placed on this Court's docket within the time prescribed for docketing, the district court may dismiss the appeal on the appellee's motion, with notice to all parties, and may make any just order with respect to costs. If the district court has denied the appellee's motion to dismiss the appeal, the appellee may move this Court to docket and dismiss the appeal by filing an original and 10 copies of a motion presented in conformity with Rules 21 and 33.2. The motion shall be accompanied by proof of service as required by Rule 29, and by a certificate from the clerk of the district court, certifying that a notice of appeal was filed and that the appellee's motion to dismiss was denied. The appellant may not thereafter file a jurisdictional statement without special leave of the Court, and the Court may allow costs against the appellant.

6. Within 30 days after the case is placed on this Court's docket, the appellee may file a motion to dismiss, to affirm, or in the alternative to affirm or dismiss. Forty copies of the motion shall be filed, except that an appellee proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis*, a copy of which shall precede and be attached to each copy of the motion to dismiss, to affirm, or in the alternative to affirm or dismiss. The motion shall follow, insofar as applicable, the form for a brief in opposition prescribed by Rule 15, and shall comply in all respects with Rule 21.

7. The Clerk will distribute the jurisdictional statement to the Court for its consideration upon receiving an express waiver of the right to file a motion to dismiss or to affirm or, if no waiver or motion is filed, upon the expiration of the time allowed for filing. If a motion to dismiss or to affirm is timely filed, the Clerk will distribute the jurisdictional statement, motion, and any brief opposing the motion to the Court for its consideration no less than 10 days after the motion is filed.

8. Any appellant may file a brief opposing a motion to dismiss or to affirm, but distribution and consideration by the

Court under paragraph 7 of this Rule will not be deferred pending its receipt. Forty copies shall be filed, except that an appellant proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The brief shall be served as required by Rule 29.

9. If a cross-appeal has been docketed, distribution of both jurisdictional statements will be deferred until the cross-appeal is due for distribution under this Rule.

10. Any party may file a supplemental brief at any time while a jurisdictional statement is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing. A supplemental brief shall be restricted to new matter and shall follow, insofar as applicable, the form for a brief in opposition prescribed by Rule 15. Forty copies shall be filed, except that a party proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The supplemental brief shall be served as required by Rule 29.

11. The clerk of the district court shall retain possession of the record until notified by the Clerk of this Court to certify and transmit it. See Rule 12.7.

12. After considering the documents distributed under this Rule, the Court may dispose summarily of the appeal on the merits, note probable jurisdiction, or postpone consideration of jurisdiction until a hearing of the case on the merits. If not disposed of summarily, the case stands for briefing and oral argument on the merits. If consideration of jurisdiction is postponed, counsel, at the outset of their briefs and at oral argument, shall address the question of jurisdiction. If the record has not previously been filed in this Court, the Clerk of this Court will request the clerk of the court in possession of the record to certify and transmit it.

13. If the Clerk determines that a jurisdictional statement submitted timely and in good faith is in a form that does not comply with this Rule or with Rule 33 or Rule 34, the Clerk

will return it with a letter indicating the deficiency. If a corrected jurisdictional statement is received no more than 60 days after the date of the Clerk's letter, its filing will be deemed timely.

**Rule 19. Procedure on a Certified Question**

1. A United States court of appeals may certify to this Court a question or proposition of law on which it seeks instruction for the proper decision of a case. The certificate shall contain a statement of the nature of the case and the facts on which the question or proposition of law arises. Only questions or propositions of law may be certified, and they shall be stated separately and with precision. The certificate shall be prepared as required by Rule 33.2 and shall be signed by the clerk of the court of appeals.

2. When a question is certified by a United States court of appeals, this Court, on its own motion or that of a party, may consider and decide the entire matter in controversy. See 28 U. S. C. § 1254(2).

3. When a question is certified, the Clerk will notify the parties and docket the case. Counsel shall then enter their appearances. After docketing, the Clerk will submit the certificate to the Court for a preliminary examination to determine whether the case should be briefed, set for argument, or dismissed. No brief may be filed until the preliminary examination of the certificate is completed.

4. If the Court orders the case briefed or set for argument, the parties will be notified and permitted to file briefs. The Clerk of this Court then will request the clerk of the court in possession of the record to certify and transmit it. Any portion of the record to which the parties wish to direct the Court's particular attention should be printed in a joint appendix, prepared in conformity with Rule 26 by the appellant or petitioner in the court of appeals, but the fact that any part of the record has not been printed does not prevent the parties or the Court from relying on it.

5. A brief on the merits in a case involving a certified question shall comply with Rules 24, 25, and 33.1, except that

the brief for the party who is the appellant or petitioner below shall be filed within 45 days of the order requiring briefs or setting the case for argument.

### Rule 20. Procedure on a Petition for an Extraordinary Writ

1. Issuance by the Court of an extraordinary writ authorized by 28 U. S. C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

2. A petition seeking a writ authorized by 28 U. S. C. § 1651(a), § 2241, or § 2254(a) shall be prepared in all respects as required by Rules 33 and 34. The petition shall be captioned "*In re* [name of petitioner]" and shall follow, insofar as applicable, the form of a petition for a writ of certiorari prescribed by Rule 14. All contentions in support of the petition shall be included in the petition. The case will be placed on the docket when 40 copies of the petition are filed with the Clerk and the docket fee is paid, except that a petitioner proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2, together with a motion for leave to proceed *in forma pauperis*, a copy of which shall precede and be attached to each copy of the petition. The petition shall be served as required by Rule 29 (subject to subparagraph 4(b) of this Rule).

3. (a) A petition seeking a writ of prohibition, a writ of mandamus, or both in the alternative shall state the name and office or function of every person against whom relief is sought and shall set out with particularity why the relief sought is not available in any other court. A copy of the judgment with respect to which the writ is sought, including any related opinion, shall be appended to the petition to-

gether with any other document essential to understanding the petition.

(b) The petition shall be served on every party to the proceeding with respect to which relief is sought. Within 30 days after the petition is placed on the docket, a party shall file 40 copies of any brief or briefs in opposition thereto, which shall comply fully with Rule 15. If a party named as a respondent does not wish to respond to the petition, that party may so advise the Clerk and all other parties by letter. All persons served are deemed respondents for all purposes in the proceedings in this Court.

4. (a) A petition seeking a writ of habeas corpus shall comply with the requirements of 28 U. S. C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242, which requires a statement of the "reasons for not making application to the district court of the district in which the applicant is held." If the relief sought is from the judgment of a state court, the petition shall set out specifically how and where the petitioner has exhausted available remedies in the state courts or otherwise comes within the provisions of 28 U. S. C. § 2254(b). To justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. This writ is rarely granted.

(b) Habeas corpus proceedings, except in capital cases, are *ex parte*, unless the Court requires the respondent to show cause why the petition for a writ of habeas corpus should not be granted. A response, if ordered, or in a capital case, shall comply fully with Rule 15. Neither the denial of the petition, without more, nor an order of transfer to a district court under the authority of 28 U. S. C. § 2241(b), is an adjudication on the merits, and therefore does not preclude further application to another court for the relief sought.

5. The Clerk will distribute the documents to the Court for its consideration when a brief in opposition under subparagraph 3(b) of this Rule has been filed, when a response

under subparagraph 4(b) has been ordered and filed, when the time to file has expired, or when the right to file has been expressly waived.

6. If the Court orders the case set for argument, the Clerk will notify the parties whether additional briefs are required, when they shall be filed, and, if the case involves a petition for a common-law writ of certiorari, that the parties shall prepare a joint appendix in accordance with Rule 26.

## PART V. MOTIONS AND APPLICATIONS

### Rule 21. Motions to the Court

1. Every motion to the Court shall clearly state its purpose and the facts on which it is based and may present legal argument in support thereof. No separate brief may be filed. A motion should be concise and shall comply with any applicable page limits. Rule 22 governs an application addressed to a single Justice.

2. (a) A motion in any action within the Court's original jurisdiction shall comply with Rule 17.3.

(b) A motion to dismiss as moot (or a suggestion of mootness), a motion for leave to file a brief as *amicus curiae*, and any motion the granting of which would dispose of the entire case or would affect the final judgment to be entered (other than a motion to docket and dismiss under Rule 18.5 or a motion for voluntary dismissal under Rule 46) shall be prepared as required by Rule 33.1, and 40 copies shall be filed, except that a movant proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file a motion prepared as required by Rule 33.2, and shall file the number of copies required for a petition by such a person under Rule 12.2. The motion shall be served as required by Rule 29.

(c) Any other motion to the Court shall be prepared as required by Rule 33.2; the moving party shall file an original and 10 copies. The Court subsequently may order the moving party to prepare the motion as required by Rule 33.1; in that event, the party shall file 40 copies.

3. A motion to the Court shall be filed with the Clerk and shall be accompanied by proof of service as required by Rule 29. No motion may be presented in open Court, other than a motion for admission to the Bar, except when the proceeding to which it refers is being argued. Oral argument on a motion will not be permitted unless the Court so directs.

4. Any response to a motion shall be filed as promptly as possible considering the nature of the relief sought and any asserted need for emergency action, and, in any event, within 10 days of receipt, unless the Court or a Justice, or the Clerk under Rule 30.4, orders otherwise. A response to a motion prepared as required by Rule 33.1, except a response to a motion for leave to file an *amicus curiae* brief (see Rule 37.5), shall be prepared in the same manner if time permits. In an appropriate case, the Court may act on a motion without waiting for a response.

**Rule 22. Applications to Individual Justices**

1. An application addressed to an individual Justice shall be filed with the Clerk, who will transmit it promptly to the Justice concerned if an individual Justice has authority to grant the sought relief.

2. The original and two copies of any application addressed to an individual Justice shall be prepared as required by Rule 33.2, and shall be accompanied by proof of service as required by Rule 29.

3. An application shall be addressed to the Justice allotted to the Circuit from which the case arises. When the Circuit Justice is unavailable for any reason, the application addressed to that Justice will be distributed to the Justice then available who is next junior to the Circuit Justice; the turn of the Chief Justice follows that of the most junior Justice.

4. A Justice denying an application will note the denial thereon. Thereafter, unless action thereon is restricted by law to the Circuit Justice or is untimely under Rule 30.2, the party making an application, except in the case of an application for an extension of time, may renew it to any other Justice, subject to the provisions of this Rule. Except

when the denial is without prejudice, a renewed application is not favored. Renewed application is made by a letter to the Clerk, designating the Justice to whom the application is to be directed, and accompanied by 10 copies of the original application and proof of service as required by Rule 29.

5. A Justice to whom an application for a stay or for bail is submitted may refer it to the Court for determination.

6. The Clerk will advise all parties concerned, by appropriately speedy means, of the disposition made of an application.

**Rule 23. Stays**

1. A stay may be granted by a Justice as permitted by law.

2. A party to a judgment sought to be reviewed may present to a Justice an application to stay the enforcement of that judgment. See 28 U. S. C. § 2101(f).

3. An application for a stay shall set out with particularity why the relief sought is not available from any other court or judge. Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof. An application for a stay shall identify the judgment sought to be reviewed and have appended thereto a copy of the order and opinion, if any, and a copy of the order, if any, of the court or judge below denying the relief sought, and shall set out specific reasons why a stay is justified. The form and content of an application for a stay are governed by Rules 22 and 33.2.

4. A judge, court, or Justice granting an application for a stay pending review by this Court may condition the stay on the filing of a supersedeas bond having an approved surety or sureties. The bond will be conditioned on the satisfaction of the judgment in full, together with any costs, interest, and damages for delay that may be awarded. If a part of the judgment sought to be reviewed has already been satisfied, or is otherwise secured, the bond may be conditioned on the

satisfaction of the part of the judgment not otherwise secured or satisfied, together with costs, interest, and damages.

## Part VI. Briefs on the Merits and Oral Argument

### Rule 24. Briefs on the Merits: In General

1. A brief on the merits for a petitioner or an appellant shall comply in all respects with Rules 33.1 and 34 and shall contain in the order here indicated:

(a) The questions presented for review under Rule 14.1(a). The questions shall be set out on the first page following the cover, and no other information may appear on that page. The phrasing of the questions presented need not be identical with that in the petition for a writ of certiorari or the jurisdictional statement, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.

(b) A list of all parties to the proceeding in the court whose judgment is under review (unless the caption of the case in this Court contains the names of all parties). Any amended corporate disclosure statement as required by Rule 29.6 shall be placed here.

(c) If the brief exceeds five pages, a table of contents and a table of cited authorities.

(d) Citations of the official and unofficial reports of the opinions and orders entered in the case by courts and administrative agencies.

(e) A concise statement of the basis for jurisdiction in this Court, including the statutory provisions and time factors on which jurisdiction rests.

(f) The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, set out verbatim with appropriate citation. If the provisions involved are lengthy, their citation alone suffices at this point, and their pertinent text, if not already set out in the petition for a

writ of certiorari, jurisdictional statement, or an appendix to either document, shall be set out in an appendix to the brief.

(g) A concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix, *e. g.*, App. 12, or to the record, *e. g.*, Record 12.

(h) A summary of the argument, suitably paragraphed. The summary should be a clear and concise condensation of the argument made in the body of the brief; mere repetition of the headings under which the argument is arranged is not sufficient.

(i) The argument, exhibiting clearly the points of fact and of law presented and citing the authorities and statutes relied on.

(j) A conclusion specifying with particularity the relief the party seeks.

2. A brief on the merits for a respondent or an appellee shall conform to the foregoing requirements, except that items required by subparagraphs 1(a), (b), (d), (e), (f), and (g) of this Rule need not be included unless the respondent or appellee is dissatisfied with their presentation by the opposing party.

3. A brief on the merits may not exceed the page limitations specified in Rule 33.1(g). An appendix to a brief may include only relevant material, and counsel are cautioned not to include in an appendix arguments or citations that properly belong in the body of the brief.

4. A reply brief shall conform to those portions of this Rule applicable to the brief for a respondent or an appellee, but, if appropriately divided by topical headings, need not contain a summary of the argument.

5. A reference to the joint appendix or to the record set out in any brief shall indicate the appropriate page number. If the reference is to an exhibit, the page numbers at which the exhibit appears, at which it was offered in evidence, and at which it was ruled on by the judge shall be indicated, *e. g.*, Pl. Exh. 14, Record 199, 2134.

6. A brief shall be concise, logically arranged with proper headings, and free of irrelevant, immaterial, or scandalous matter. The Court may disregard or strike a brief that does not comply with this paragraph.

### Rule 25. Briefs on the Merits: Number of Copies and Time to File

1. The petitioner or appellant shall file 40 copies of the brief on the merits within 45 days of the order granting the writ of certiorari, noting probable jurisdiction, or postponing consideration of jurisdiction. Any respondent or appellee who supports the petitioner or appellant shall meet the petitioner's or appellant's time schedule for filing documents.

2. The respondent or appellee shall file 40 copies of the brief on the merits within 35 days after the brief for the petitioner or appellant is filed.

3. The petitioner or appellant shall file 40 copies of the reply brief, if any, within 35 days after the brief for the respondent or appellee is filed, but any reply brief must actually be received by the Clerk not later than one week before the date of oral argument. Any respondent or appellee supporting the petitioner or appellant may file a reply brief.

4. The time periods stated in paragraphs 1 and 2 of this Rule may be extended as provided in Rule 30. An application to extend the time to file a brief on the merits is not favored. If a case is advanced for hearing, the time to file briefs on the merits may be abridged as circumstances require pursuant to an order of the Court on its own motion or that of a party.

5. A party wishing to present late authorities, newly enacted legislation, or other intervening matter that was not available in time to be included in a brief may file 40 copies of a supplemental brief, restricted to such new matter and otherwise presented in conformity with these Rules, up to the time the case is called for oral argument or by leave of the Court thereafter.

6. After a case has been argued or submitted, the Clerk will not file any brief, except that of a party filed by leave of the Court.

7. The Clerk will not file any brief that is not accompanied by proof of service as required by Rule 29.

**Rule 26. Joint Appendix**

1. Unless the Clerk has allowed the parties to use the deferred method described in paragraph 4 of this Rule, the petitioner or appellant, within 45 days after entry of the order granting the writ of certiorari, noting probable jurisdiction, or postponing consideration of jurisdiction, shall file 40 copies of a joint appendix, prepared as required by Rule 33.1. The joint appendix shall contain: (1) the relevant docket entries in all the courts below; (2) any relevant pleadings, jury instructions, findings, conclusions, or opinions; (3) the judgment, order, or decision under review; and (4) any other parts of the record that the parties particularly wish to bring to the Court's attention. Any of the foregoing items already reproduced in a petition for a writ of certiorari, jurisdictional statement, brief in opposition to a petition for a writ of certiorari, motion to dismiss or affirm, or any appendix to the foregoing, that was prepared as required by Rule 33.1, need not be reproduced again in the joint appendix. The petitioner or appellant shall serve three copies of the joint appendix on each of the other parties to the proceeding as required by Rule 29.

2. The parties are encouraged to agree on the contents of the joint appendix. In the absence of agreement, the petitioner or appellant, within 10 days after entry of the order granting the writ of certiorari, noting probable jurisdiction, or postponing consideration of jurisdiction, shall serve on the respondent or appellee a designation of parts of the record to be included in the joint appendix. Within 10 days after receiving the designation, a respondent or appellee who considers the parts of the record so designated insufficient shall serve on the petitioner or appellant a designation of additional parts to be included in the joint appendix, and the

petitioner or appellant shall include the parts so designated. If the Court has permitted the respondent or appellee to proceed *in forma pauperis*, the petitioner or appellant may seek by motion to be excused from printing portions of the record the petitioner or appellant considers unnecessary. In making these designations, counsel should include only those materials the Court should examine; unnecessary designations should be avoided. The record is on file with the Clerk and available to the Justices, and counsel may refer in briefs and in oral argument to relevant portions of the record not included in the joint appendix.

3. When the joint appendix is filed, the petitioner or appellant immediately shall file with the Clerk a statement of the cost of printing 50 copies and shall serve a copy of the statement on each of the other parties as required by Rule 29. Unless the parties agree otherwise, the cost of producing the joint appendix shall be paid initially by the petitioner or appellant; but a petitioner or appellant who considers that parts of the record designated by the respondent or appellee are unnecessary for the determination of the issues presented may so advise the respondent or appellee, who then shall advance the cost of printing the additional parts, unless the Court or a Justice otherwise fixes the initial allocation of the costs. The cost of printing the joint appendix is taxed as a cost in the case, but if a party unnecessarily causes matter to be included in the joint appendix or prints excessive copies, the Court may impose these costs on that party.

4. (a) On the parties' request, the Clerk may allow preparation of the joint appendix to be deferred until after the briefs have been filed. In that event, the petitioner or appellant shall file the joint appendix no more than 14 days after receiving the brief for the respondent or appellee. The provisions of paragraphs 1, 2, and 3 of this Rule shall be followed, except that the designations referred to therein shall be made by each party when that party's brief is served. Deferral of the joint appendix is not favored.

(b) If the deferred method is used, the briefs on the merits may refer to the pages of the record. In that event, the

joint appendix shall include in brackets on each page thereof the page number of the record where that material may be found. A party wishing to refer directly to the pages of the joint appendix may serve and file copies of its brief prepared as required by Rule 33.2 within the time provided by Rule 25, with appropriate references to the pages of the record. In that event, within 10 days after the joint appendix is filed, copies of the brief prepared as required by Rule 33.1 containing references to the pages of the joint appendix in place of, or in addition to, the initial references to the pages of the record, shall be served and filed. No other change may be made in the brief as initially served and filed, except that typographical errors may be corrected.

5. The joint appendix shall be prefaced by a table of contents showing the parts of the record that it contains, in the order in which the parts are set out, with references to the pages of the joint appendix at which each part begins. The relevant docket entries shall be set out after the table of contents, followed by the other parts of the record in chronological order. When testimony contained in the reporter's transcript of proceedings is set out in the joint appendix, the page of the transcript at which the testimony appears shall be indicated in brackets immediately before the statement that is set out. Omissions in the transcript or in any other document printed in the joint appendix shall be indicated by asterisks. Immaterial formal matters (*e. g.*, captions, subscriptions, acknowledgments) shall be omitted. A question and its answer may be contained in a single paragraph.

6. Exhibits designated for inclusion in the joint appendix may be contained in a separate volume or volumes suitably indexed. The transcript of a proceeding before an administrative agency, board, commission, or officer used in an action in a district court or court of appeals is regarded as an exhibit for the purposes of this paragraph.

7. The Court, on its own motion or that of a party, may dispense with the requirement of a joint appendix and may permit a case to be heard on the original record (with such copies of the record, or relevant parts thereof, as the Court

may require) or on the appendix used in the court below, if it conforms to the requirements of this Rule.

8. For good cause, the time limits specified in this Rule may be shortened or extended by the Court or a Justice, or by the Clerk under Rule 30.4.

**Rule 27. Calendar**

1. From time to time, the Clerk will prepare a calendar of cases ready for argument. A case ordinarily will not be called for argument less than two weeks after the brief on the merits for the respondent or appellee is due.

2. The Clerk will advise counsel when they are required to appear for oral argument and will publish a hearing list in advance of each argument session for the convenience of counsel and the information of the public.

3. The Court, on its own motion or that of a party, may order that two or more cases involving the same or related questions be argued together as one case or on such other terms as the Court may prescribe.

**Rule 28. Oral Argument**

1. Oral argument should emphasize and clarify the written arguments in the briefs on the merits. Counsel should assume that all Justices have read the briefs before oral argument. Oral argument read from a prepared text is not favored.

2. The petitioner or appellant shall open and may conclude the argument. A cross-writ of certiorari or cross-appeal will be argued with the initial writ of certiorari or appeal as one case in the time allowed for that one case, and the Court will advise the parties who shall open and close.

3. Unless the Court directs otherwise, each side is allowed one-half hour for argument. Counsel is not required to use all the allotted time. Any request for additional time to argue shall be presented by motion under Rule 21 no more than 15 days after the petitioner's or appellant's brief on the merits is filed, and shall set out specifically and concisely why the case cannot be presented within the half-hour limitation. Additional time is rarely accorded.

4. Only one attorney will be heard for each side, except by leave of the Court on motion filed no more than 15 days after the respondent's or appellee's brief on the merits is filed. Any request for divided argument shall be presented by motion under Rule 21 and shall set out specifically and concisely why more than one attorney should be allowed to argue. Divided argument is not favored.

5. Regardless of the number of counsel participating in oral argument, counsel making the opening argument shall present the case fairly and completely and not reserve points of substance for rebuttal.

6. Oral argument will not be allowed on behalf of any party for whom a brief has not been filed.

7. By leave of the Court, and subject to paragraph 4 of this Rule, counsel for an *amicus curiae* whose brief has been filed as provided in Rule 37 may argue orally on the side of a party, with the consent of that party. In the absence of consent, counsel for an *amicus curiae* may seek leave of the Court to argue orally by a motion setting out specifically and concisely why oral argument would provide assistance to the Court not otherwise available. Such a motion will be granted only in the most extraordinary circumstances.

## PART VII. PRACTICE AND PROCEDURE

### Rule 29. Filing and Service of Documents; Special Notifications; Corporate Listing

1. Any document required or permitted to be presented to the Court or to a Justice shall be filed with the Clerk.

2. A document is timely filed if it is received by the Clerk within the time specified for filing; or if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on or before the last day for filing; or if it is delivered on or before the last day for filing to a third-party commercial carrier for delivery to the Clerk within 3 calendar days. If submitted

by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U. S. C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid. If the postmark is missing or not legible, or if the third-party commercial carrier does not provide the date the document was received by the carrier, the Clerk will require the person who sent the document to submit a notarized statement or declaration in compliance with 28 U. S. C. § 1746 setting out the details of the filing and stating that the filing took place on a particular date within the permitted time.

3. Any document required by these Rules to be served may be served personally, by mail, or by third-party commercial carrier for delivery within 3 calendar days on each party to the proceeding at or before the time of filing. If the document has been prepared as required by Rule 33.1, three copies shall be served on each other party separately represented in the proceeding. If the document has been prepared as required by Rule 33.2, service of a single copy on each other separately represented party suffices. If personal service is made, it shall consist of delivery at the office of the counsel of record, either to counsel or to an employee therein. If service is by mail or third-party commercial carrier, it shall consist of depositing the document with the United States Postal Service, with no less than first-class postage prepaid, or delivery to the carrier for delivery within 3 calendar days, addressed to counsel of record at the proper address. When a party is not represented by counsel, service shall be made on the party, personally, by mail, or by commercial carrier. Ordinarily, service on a party must be by a manner at least as expeditious as the manner used to file the document with the Court.

4. (a) If the United States or any federal department, office, agency, officer, or employee is a party to be served, service shall be made on the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania

Ave., N. W., Washington, DC 20530-0001. When an agency of the United States that is a party is authorized by law to appear before this Court on its own behalf, or when an officer or employee of the United States is a party, the agency, officer, or employee shall be served in addition to the Solicitor General.

(b) In any proceeding in this Court in which the constitutionality of an Act of Congress is drawn into question, and neither the United States nor any federal department, office, agency, officer, or employee is a party, the initial document filed in this Court shall recite that 28 U. S. C. § 2403(a) may apply and shall be served on the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N. W., Washington, DC 20530-0001. In such a proceeding from any court of the United States, as defined by 28 U. S. C. § 451, the initial document also shall state whether that court, pursuant to 28 U. S. C. § 2403(a), certified to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question. See Rule 14.1(e)(v).

(c) In any proceeding in this Court in which the constitutionality of any statute of a State is drawn into question, and neither the State nor any agency, officer, or employee thereof is a party, the initial document filed in this Court shall recite that 28 U. S. C. § 2403(b) may apply and shall be served on the Attorney General of that State. In such a proceeding from any court of the United States, as defined by 28 U. S. C. § 451, the initial document also shall state whether that court, pursuant to 28 U. S. C. § 2403(b), certified to the State Attorney General the fact that the constitutionality of a statute of that State was drawn into question. See Rule 14.1(e)(v).

5. Proof of service, when required by these Rules, shall accompany the document when it is presented to the Clerk for filing and shall be separate from it. Proof of service shall contain, or be accompanied by, a statement that all parties required to be served have been served, together with a list of the names, addresses, and telephone numbers of

counsel indicating the name of the party or parties each counsel represents. It is not necessary that service on each party required to be served be made in the same manner or evidenced by the same proof. Proof of service may consist of any one of the following:

(a) an acknowledgment of service, signed by counsel of record for the party served, and bearing the address and telephone number of such counsel;

(b) a certificate of service, reciting the facts and circumstances of service in compliance with the appropriate paragraph or paragraphs of this Rule, and signed by a member of the Bar of this Court representing the party on whose behalf service is made or by an attorney appointed to represent that party under the Criminal Justice Act of 1964, see 18 U. S. C. § 3006A(d)(6), or under any other applicable federal statute; or

(c) a notarized affidavit or declaration in compliance with 28 U. S. C. § 1746, reciting the facts and circumstances of service in accordance with the appropriate paragraph or paragraphs of this Rule, whenever service is made by any person not a member of the Bar of this Court and not an attorney appointed to represent a party under the Criminal Justice Act of 1964, see 18 U. S. C. § 3006A(d)(6), or under any other applicable federal statute.

6. Every document, except a joint appendix or *amicus curiae* brief, filed by or on behalf of a nongovernmental corporation shall contain a corporate disclosure statement identifying the parent corporations and listing any publicly held company that owns 10% or more of the corporation's stock. If there is no parent or publicly held company owning 10% or more of the corporation's stock, a notation to this effect shall be included in the document. If a statement has been included in a document filed earlier in the case, reference may be made to the earlier document (except when the earlier statement appeared in a document prepared under Rule 33.2), and only amendments to the statement to make it current need be included in the document being filed.

**Rule 30. Computation and Extension of Time**

1. In the computation of any period of time prescribed or allowed by these Rules, by order of the Court, or by an applicable statute, the day of the act, event, or default from which the designated period begins to run is not included. The last day of the period shall be included, unless it is a Saturday, Sunday, federal legal holiday listed in 5 U. S. C. § 6103, or day on which the Court building is closed by order of the Court or the Chief Justice, in which event the period shall extend until the end of the next day that is not a Saturday, Sunday, federal legal holiday, or day on which the Court building is closed.

2. Whenever a Justice or the Clerk is empowered by law or these Rules to extend the time to file any document, an application seeking an extension shall be filed within the period sought to be extended. An application to extend the time to file a petition for a writ of certiorari or to file a jurisdictional statement must be filed at least 10 days before the specified final filing date as computed under these Rules; if filed less than 10 days before the final filing date, such application will not be granted except in the most extraordinary circumstances.

3. An application to extend the time to file a petition for a writ of certiorari, to file a jurisdictional statement, to file a reply brief on the merits, or to file a petition for rehearing shall be made to an individual Justice and presented and served on all other parties as provided by Rule 22. Once denied, such an application may not be renewed.

4. An application to extend the time to file any document or paper other than those specified in paragraph 3 of this Rule may be presented in the form of a letter to the Clerk setting out specific reasons why an extension of time is justified. The letter shall be served on all other parties as required by Rule 29. The application may be acted on by the Clerk in the first instance, and any party aggrieved by the Clerk's action may request that the application be submitted to a Justice or to the Court. The Clerk will report action under this paragraph to the Court as instructed.

**Rule 31. Translations**

Whenever any record to be transmitted to this Court contains material written in a foreign language without a translation made under the authority of the lower court, or admitted to be correct, the clerk of the court transmitting the record shall advise the Clerk of this Court immediately so that this Court may order that a translation be supplied and, if necessary, printed as part of the joint appendix.

**Rule 32. Models, Diagrams, Exhibits, and Lodgings**

1. Models, diagrams, and exhibits of material forming part of the evidence taken in a case and brought to this Court for its inspection shall be placed in the custody of the Clerk at least two weeks before the case is to be heard or submitted.

2. All models, diagrams, exhibits, and other items placed in the custody of the Clerk shall be removed by the parties no more than 40 days after the case is decided. If this is not done, the Clerk will notify counsel to remove the articles forthwith. If they are not removed within a reasonable time thereafter, the Clerk will destroy them or dispose of them in any other appropriate way.

3. Any party or *amicus curiae* desiring to lodge non-record material with the Clerk must set out in a letter, served on all parties, a description of the material proposed for lodging and the reasons why the non-record material may properly be considered by the Court. The material proposed for lodging may not be submitted until and unless requested by the Clerk.

**Rule 33. Document Preparation: Booklet Format; 8½- by 11-Inch Paper Format**

1. *Booklet Format:* (a) Except for a document expressly permitted by these Rules to be submitted on 8½- by 11-inch paper, see, *e. g.*, Rules 21, 22, and 39, every document filed with the Court shall be prepared in a 6⅛- by 9¼-inch booklet format using a standard typesetting process (*e. g.*, hot metal, photocomposition, or computer typesetting) to produce text printed in typographic (as opposed to typewriter) characters.

The process used must produce a clear, black image on white paper. The text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(b) The text of every booklet-format document, including any appendix thereto, shall be typeset in Roman 11-point or larger type with 2-point or more leading between lines. The typeface should be similar to that used in current volumes of the United States Reports. Increasing the amount of text by using condensed or thinner typefaces, or by reducing the space between letters, is strictly prohibited. Type size and face shall be consistent throughout. Quotations in excess of 50 words shall be indented. The typeface of footnotes shall be 9-point or larger with 2-point or more leading between lines. The text of the document must appear on both sides of the page.

(c) Every booklet-format document shall be produced on paper that is opaque, unglazed, and not less than 60 pounds in weight, and shall have margins of at least three-fourths of an inch on all sides. The text field, including footnotes, may not exceed 4⅛ by 7⅛ inches. The document shall be bound firmly in at least two places along the left margin (saddle stitch or perfect binding preferred) so as to permit easy opening, and no part of the text should be obscured by the binding. Spiral, plastic, metal, or string bindings may not be used. Copies of patent documents, except opinions, may be duplicated in such size as is necessary in a separate appendix.

(d) Every booklet-format document, shall comply with the page limits shown on the chart in subparagraph 1(g) of this Rule. The page limits do not include the questions presented, the list of parties and the corporate disclosure statement, the table of contents, the table of cited authorities, or any appendix. Verbatim quotations required under Rule 14.1(f), if set out in the text of a brief rather than in the appendix, are also excluded. For good cause, the Court or a Justice may grant leave to file a document in excess of the page limits, but application for such leave is not favored. An application to exceed page limits shall comply with Rule

22 and must be received by the Clerk at least 15 days before the filing date of the document in question, except in the most extraordinary circumstances.

(e) Every booklet-format document, shall have a suitable cover consisting of 65-pound weight paper in the color indicated on the chart in subparagraph 1(g) of this Rule. If a separate appendix to any document is filed, the color of its cover shall be the same as that of the cover of the document it supports. The Clerk will furnish a color chart upon request. Counsel shall ensure that there is adequate contrast between the printing and the color of the cover. A document filed by the United States, or by any other federal party represented by the Solicitor General, shall have a gray cover. A joint appendix, answer to a bill of complaint, motion for leave to intervene, and any other document not listed in subparagraph 1(g) of this Rule shall have a tan cover.

(f) Forty copies of a booklet-format document shall be filed.

(g) Page limits and cover colors for booklet-format documents are as follows:

| | Type of Document | Page Limits | Color of Cover |
|---|---|---|---|
| (i) | Petition for a Writ of Certiorari (Rule 14); Motion for Leave to File a Bill of Complaint and Brief in Support (Rule 17.3); Jurisdictional Statement (Rule 18.3); Petition for an Extraordinary Writ (Rule 20.2) | 30 | white |
| (ii) | Brief in Opposition (Rule 15.3); Brief in Opposition to Motion for Leave to File an Original Action (Rule 17.5); Motion to Dismiss or Affirm (Rule 18.6); Brief in Opposition to Mandamus or Prohibition (Rule 20.3(b)); Response to a Petition for Habeas Corpus (Rule 20.4) | 30 | orange |
| (iii) | Reply to Brief in Opposition (Rules 15.6 and 17.5); Brief Opposing a Motion to Dismiss or Affirm (Rule 18.8) | 10 | tan |
| (iv) | Supplemental Brief (Rules 15.8, 17, 18.10, and 25.5) | 10 | tan |
| (v) | Brief on the Merits for Petitioner or Appellant (Rule 24); Exceptions by Plaintiff to Report of Special Master (Rule 17) | 50 | light blue |

| Type of Document | Page Limits | Color of Cover |
|---|---|---|
| (vi) Brief on the Merits for Respondent or Appellee (Rule 24.2); Brief on the Merits for Respondent or Appellee Supporting Petitioner or Appellant (Rule 12.6); Exceptions by Party Other Than Plaintiff to Report of Special Master (Rule 17) | 50 | light red |
| (vii) Reply Brief on the Merits (Rule 24.4) | 20 | yellow |
| (viii) Reply to Plaintiff's Exceptions to Report of Special Master (Rule 17) | 50 | orange |
| (ix) Reply to Exceptions by Party Other Than Plaintiff to Report of Special Master (Rule 17) | 50 | yellow |
| (x) Brief for an *Amicus Curiae* at the Petition Stage (Rule 37.2) | 20 | cream |
| (xi) Brief for an *Amicus Curiae* in Support of the Plaintiff, Petitioner, or Appellant, or in Support of Neither Party, on the Merits or in an Original Action at the Exceptions Stage (Rule 37.3) | 30 | light green |
| (xii) Brief for an *Amicus Curiae* in Support of the Defendant, Respondent, or Appellee, on the Merits or in an Original Action at the Exceptions Stage (Rule 37.3) | 30 | dark green |
| (xiii) Petition for Rehearing (Rule 44) | 10 | tan |

2. *8½- by 11-Inch Paper Format:* (a) The text of every document, including any appendix thereto, expressly permitted by these Rules to be presented to the Court on 8½- by 11-inch paper shall appear double spaced, except for indented quotations, which shall be single spaced, on opaque, unglazed, white paper. The document shall be stapled or bound at the upper left-hand corner. Copies, if required, shall be produced on the same type of paper and shall be legible. The original of any such document (except a motion to dismiss or affirm under Rule 18.6) shall be signed by the party proceeding *pro se* or by counsel of record who must be a member of the Bar of this Court or an attorney appointed under the Criminal Justice Act of 1964, see 18 U. S. C. § 3006A(d)(6), or under any other applicable federal statute. Subparagraph 1(g) of this Rule does not apply to documents prepared under this paragraph.

(b) Page limits for documents presented on 8½- by 11-inch paper are: 40 pages for a petition for a writ of certiorari, jurisdictional statement, petition for an extraordinary writ, brief in opposition, or motion to dismiss or affirm; and 15 pages for a reply to a brief in opposition, brief opposing a motion to dismiss or affirm, supplemental brief, or petition for rehearing. The page exclusions specified in subparagraph 1(d) of this Rule apply.

**Rule 34. Document Preparation: General Requirements**

Every document, whether prepared under Rule 33.1 or Rule 33.2, shall comply with the following provisions:

1. Each document shall bear on its cover, in the order indicated, from the top of the page:

(a) the docket number of the case or, if there is none, a space for one;

(b) the name of this Court;

(c) the caption of the case as appropriate in this Court;

(d) the nature of the proceeding and the name of the court from which the action is brought (*e. g.*, "On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit"; or, for a merits brief, "On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit");

(e) the title of the document (*e. g.*, "Petition for Writ of Certiorari," "Brief for Respondent," "Joint Appendix");

(f) the name of the attorney who is counsel of record for the party concerned (who must be a member of the Bar of this Court except as provided in Rule 33.2), and on whom service is to be made, with a notation directly thereunder identifying the attorney as counsel of record and setting out counsel's office address and telephone number. Only one counsel of record may be noted on a single document. The names of other members of the Bar of this Court or of the bar of the highest court of a State acting as counsel, and, if desired, their addresses, may be added, but counsel of record shall be clearly identified. Names of persons other than attorneys admitted to a state bar may not be listed, unless the party is appearing *pro se*, in which case the party's name,

address, and telephone number shall appear. The foregoing shall be displayed in an appropriate typographic manner and, except for the identification of counsel, may not be set in type smaller than standard 11-point, if the document is prepared as required by Rule 33.1.

2. Every document exceeding five pages (other than a joint appendix), whether prepared under Rule 33.1 or Rule 33.2, shall contain a table of contents and a table of cited authorities (*i. e.*, cases alphabetically arranged, constitutional provisions, statutes, treatises, and other materials) with references to the pages in the document where such authorities are cited.

3. The body of every document shall bear at its close the name of counsel of record and such other counsel, identified on the cover of the document in conformity with subparagraph 1(f) of this Rule, as may be desired.

### Rule 35. Death, Substitution, and Revivor; Public Officers

1. If a party dies after the filing of a petition for a writ of certiorari to this Court, or after the filing of a notice of appeal, the authorized representative of the deceased party may appear and, on motion, be substituted as a party. If the representative does not voluntarily become a party, any other party may suggest the death on the record and, on motion, seek an order requiring the representative to become a party within a designated time. If the representative then fails to become a party, the party so moving, if a respondent or appellee, is entitled to have the petition for a writ of certiorari or the appeal dismissed, and if a petitioner or appellant, is entitled to proceed as in any other case of nonappearance by a respondent or appellee. If the substitution of a representative of the deceased is not made within six months after the death of the party, the case shall abate.

2. Whenever a case cannot be revived in the court whose judgment is sought to be reviewed, because the deceased party's authorized representative is not subject to that

court's jurisdiction, proceedings will be conducted as this Court may direct.

3. When a public officer who is a party to a proceeding in this Court in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate and any successor in office is automatically substituted as a party. The parties shall notify the Clerk in writing of any such successions. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting substantial rights of the parties will be disregarded.

4. A public officer who is a party to a proceeding in this Court in an official capacity may be described as a party by the officer's official title rather than by name, but the Court may require the name to be added.

### Rule 36. Custody of Prisoners in Habeas Corpus Proceedings

1. Pending review in this Court of a decision in a habeas corpus proceeding commenced before a court, Justice, or judge of the United States, the person having custody of the prisoner may not transfer custody to another person unless the transfer is authorized under this Rule.

2. Upon application by a custodian, the court, Justice, or judge who entered the decision under review may authorize transfer and the substitution of a successor custodian as a party.

3. (a) Pending review of a decision failing or refusing to release a prisoner, the prisoner may be detained in the custody from which release is sought or in other appropriate custody or may be enlarged on personal recognizance or bail, as may appear appropriate to the court, Justice, or judge who entered the decision, or to the court of appeals, this Court, or a judge or Justice of either court.

(b) Pending review of a decision ordering release, the prisoner shall be enlarged on personal recognizance or bail, unless the court, Justice, or judge who entered the decision, or the court of appeals, this Court, or a judge or Justice of either court, orders otherwise.

4. An initial order respecting the custody or enlargement of the prisoner, and any recognizance or surety taken, shall continue in effect pending review in the court of appeals and in this Court unless for reasons shown to the court of appeals, this Court, or a judge or Justice of either court, the order is modified or an independent order respecting custody, enlargement, or surety is entered.

**Rule 37. Brief for an *Amicus Curiae***

1. An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.

2. (a) An *amicus curiae* brief submitted before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ, may be filed if accompanied by the written consent of all parties, or if the Court grants leave to file under subparagraph 2(b) of this Rule. The brief shall be submitted within the time allowed for filing a brief in opposition or for filing a motion to dismiss or affirm. The *amicus curiae* brief shall specify whether consent was granted, and its cover shall identify the party supported.

(b) When a party to the case has withheld consent, a motion for leave to file an *amicus curiae* brief before the Court's consideration of a petition for a writ of certiorari, motion for leave to file a bill of complaint, jurisdictional statement, or petition for an extraordinary writ may be presented to the Court. The motion, prepared as required by Rule 33.1 and as one document with the brief sought to be filed, shall be submitted within the time allowed for filing an *amicus curiae* brief, and shall indicate the party or parties who have withheld consent and state the nature of the movant's interest. Such a motion is not favored.

3. (a) An *amicus curiae* brief in a case before the Court for oral argument may be filed if accompanied by the written

consent of all parties, or if the Court grants leave to file under subparagraph 3(b) of this Rule. The brief shall be submitted within the time allowed for filing the brief for the party supported, or if in support of neither party, within the time allowed for filing the petitioner's or appellant's brief. The *amicus curiae* brief shall specify whether consent was granted, and its cover shall identify the party supported or indicate whether it suggests affirmance or reversal. The Clerk will not file a reply brief for an *amicus curiae*, or a brief for an *amicus curiae* in support of, or in opposition to, a petition for rehearing.

(b) When a party to a case before the Court for oral argument has withheld consent, a motion for leave to file an *amicus curiae* brief may be presented to the Court. The motion, prepared as required by Rule 33.1 and as one document with the brief sought to be filed, shall be submitted within the time allowed for filing an *amicus curiae* brief, and shall indicate the party or parties who have withheld consent and state the nature of the movant's interest.

4. No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of the United States by the Solicitor General; on behalf of any agency of the United States allowed by law to appear before this Court when submitted by the agency's authorized legal representative; on behalf of a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer.

5. A brief or motion filed under this Rule shall be accompanied by proof of service as required by Rule 29, and shall comply with the applicable provisions of Rules 21, 24, and 33.1 (except that it suffices to set out in the brief the interest of the *amicus curiae*, the summary of the argument, the argument, and the conclusion). A motion for leave to file may not exceed five pages. A party served with the motion may file an objection thereto, stating concisely the reasons for

withholding consent; the objection shall be prepared as required by Rule 33.2.

6. Except for briefs presented on behalf of *amicus curiae* listed in Rule 37.4, a brief filed under this Rule shall indicate whether counsel for a party authored the brief in whole or in part and shall identify every person or entity, other than the *amicus curiae*, its members, or its counsel, who made a monetary contribution to the preparation or submission of the brief. The disclosure shall be made in the first footnote on the first page of text.

**Rule 38. Fees**

Under 28 U. S. C. § 1911, the fees charged by the Clerk are:

(a) for docketing a case on a petition for a writ of certiorari or on appeal or for docketing any other proceeding, except a certified question or a motion to docket and dismiss an appeal under Rule 18.5, $300;

(b) for filing a petition for rehearing or a motion for leave to file a petition for rehearing, $200;

(c) for reproducing and certifying any record or paper, $1 per page; and for comparing with the original thereof any photographic reproduction of any record or paper, when furnished by the person requesting its certification, $.50 per page;

(d) for a certificate bearing the seal of the Court, $10; and

(e) for a check paid to the Court, Clerk, or Marshal that is returned for lack of funds, $35.

**Rule 39. Proceedings *In Forma Pauperis***

1. A party seeking to proceed *in forma pauperis* shall file a motion for leave to do so, together with the party's notarized affidavit or declaration (in compliance with 28 U. S. C. § 1746) in the form prescribed by the Federal Rules of Appellate Procedure, Form 4. The motion shall state whether leave to proceed *in forma pauperis* was sought in any other court and, if so, whether leave was granted. If the United States district court or the United States court of appeals

has appointed counsel under the Criminal Justice Act of 1964, 18 U. S. C. § 3006A, or under any other applicable federal statute, no affidavit or declaration is required, but the motion shall cite the statute under which counsel was appointed.

2. If leave to proceed *in forma pauperis* is sought for the purpose of filing a document, the motion, and an affidavit or declaration if required, shall be filed together with that document and shall comply in every respect with Rule 21. As provided in that Rule, it suffices to file an original and 10 copies, unless the party is an inmate confined in an institution and is not represented by counsel, in which case the original, alone, suffices. A copy of the motion, and affidavit or declaration if required, shall precede and be attached to each copy of the accompanying document.

3. Except when these Rules expressly provide that a document shall be prepared as required by Rule 33.1, every document presented by a party proceeding under this Rule shall be prepared as required by Rule 33.2 (unless such preparation is impossible). Every document shall be legible. While making due allowance for any case presented under this Rule by a person appearing *pro se*, the Clerk will not file any document if it does not comply with the substance of these Rules or is jurisdictionally out of time.

4. When the documents required by paragraphs 1 and 2 of this Rule are presented to the Clerk, accompanied by proof of service as required by Rule 29, they will be placed on the docket without the payment of a docket fee or any other fee.

5. The respondent or appellee in a case filed *in forma pauperis* shall respond in the same manner and within the same time as in any other case of the same nature, except that the filing of an original and 10 copies of a response prepared as required by Rule 33.2, with proof of service as required by Rule 29, suffices. The respondent or appellee may challenge the grounds for the motion for leave to proceed *in forma pauperis* in a separate document or in the response itself.

6. Whenever the Court appoints counsel for an indigent party in a case set for oral argument, the briefs on the merits submitted by that counsel, unless otherwise requested, shall

be prepared under the Clerk's supervision. The Clerk also will reimburse appointed counsel for any necessary travel expenses to Washington, D. C., and return in connection with the argument.

7. In a case in which certiorari has been granted, probable jurisdiction noted, or consideration of jurisdiction postponed, this Court may appoint counsel to represent a party financially unable to afford an attorney to the extent authorized by the Criminal Justice Act of 1964, 18 U. S. C. § 3006A, or by any other applicable federal statute.

8. If satisfied that a petition for a writ of certiorari, jurisdictional statement, or petition for an extraordinary writ is frivolous or malicious, the Court may deny leave to proceed *in forma pauperis.*

**Rule 40. Veterans, Seamen, and Military Cases**

1. A veteran suing to establish reemployment rights under any provision of law exempting veterans from the payment of fees or court costs, may file a motion for leave to proceed on papers prepared as required by Rule 33.2. The motion shall ask leave to proceed as a veteran and be accompanied by an affidavit or declaration setting out the moving party's veteran status. A copy of the motion shall precede and be attached to each copy of the petition for a writ of certiorari or other substantive document filed by the veteran.

2. A seaman suing under 28 U. S. C. § 1916 may proceed without prepayment of fees or costs or furnishing security therefor, but is not entitled to proceed under Rule 33.2, except as authorized by the Court on separate motion under Rule 39.

3. An accused person petitioning for a writ of certiorari to review a decision of the United States Court of Appeals for the Armed Forces under 28 U. S. C. § 1259 may proceed without prepayment of fees or costs or furnishing security therefor and without filing an affidavit of indigency, but is not entitled to proceed on papers prepared as required by Rule

33.2, except as authorized by the Court on separate motion under Rule 39.

## PART VIII. DISPOSITION OF CASES

### Rule 41. Opinions of the Court

Opinions of the Court will be released by the Clerk immediately upon their announcement from the bench, or as the Court otherwise directs. Thereafter, the Clerk will cause the opinions to be issued in slip form, and the Reporter of Decisions will prepare them for publication in the preliminary prints and bound volumes of the United States Reports.

### Rule 42. Interest and Damages

1. If a judgment for money in a civil case is affirmed, any interest allowed by law is payable from the date the judgment under review was entered. If a judgment is modified or reversed with a direction that a judgment for money be entered below, the mandate will contain instructions with respect to the allowance of interest. Interest in cases arising in a state court is allowed at the same rate that similar judgments bear interest in the courts of the State in which judgment is directed to be entered. Interest in cases arising in a court of the United States is allowed at the interest rate authorized by law.

2. When a petition for a writ of certiorari, an appeal, or an application for other relief is frivolous, the Court may award the respondent or appellee just damages, and single or double costs under Rule 43. Damages or costs may be awarded against the petitioner, appellant, or applicant, against the party's counsel, or against both party and counsel.

### Rule 43. Costs

1. If the Court affirms a judgment, the petitioner or appellant shall pay costs unless the Court otherwise orders.

2. If the Court reverses or vacates a judgment, the respondent or appellee shall pay costs unless the Court otherwise orders.

3. The Clerk's fees and the cost of printing the joint appendix are the only taxable items in this Court. The cost of the transcript of the record from the court below is also a taxable item, but shall be taxable in that court as costs in the case. The expenses of printing briefs, motions, petitions, or jurisdictional statements are not taxable.

4. In a case involving a certified question, costs are equally divided unless the Court otherwise orders, except that if the Court decides the whole matter in controversy, as permitted by Rule 19.2, costs are allowed as provided in paragraphs 1 and 2 of this Rule.

5. To the extent permitted by 28 U. S. C. § 2412, costs under this Rule are allowed for or against the United States or an officer or agent thereof, unless expressly waived or unless the Court otherwise orders.

6. When costs are allowed in this Court, the Clerk will insert an itemization of the costs in the body of the mandate or judgment sent to the court below. The prevailing side may not submit a bill of costs.

7. In extraordinary circumstances the Court may adjudge double costs.

**Rule 44. Rehearing**

1. Any petition for the rehearing of any judgment or decision of the Court on the merits shall be filed within 25 days after entry of the judgment or decision, unless the Court or a Justice shortens or extends the time. The petitioner shall file 40 copies of the rehearing petition and shall pay the filing fee prescribed by Rule 38(b), except that a petitioner proceeding *in forma pauperis* under Rule 39, including an inmate of an institution, shall file the number of copies required for a petition by such a person under Rule 12.2. The petition shall state its grounds briefly and distinctly and shall be served as required by Rule 29. The petition shall be presented together with certification of counsel (or of a party unrepresented by counsel) that it is presented in good faith and not for delay; one copy of the certificate shall bear the signature of counsel (or of a party unrepresented

by counsel). A copy of the certificate shall follow and be attached to each copy of the petition. A petition for rehearing is not subject to oral argument and will not be granted except by a majority of the Court, at the instance of a Justice who concurred in the judgment or decision.

2. Any petition for the rehearing of an order denying a petition for a writ of certiorari or extraordinary writ shall be filed within 25 days after the date of the order of denial and shall comply with all the form and filing requirements of paragraph 1 of this Rule, including the payment of the filing fee if required, but its grounds shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. The petition shall be presented together with certification of counsel (or of a party unrepresented by counsel) that it is restricted to the grounds specified in this paragraph and that it is presented in good faith and not for delay; one copy of the certificate shall bear the signature of counsel (or of a party unrepresented by counsel). The certificate shall be bound with each copy of the petition. The Clerk will not file a petition without a certificate. The petition is not subject to oral argument.

3. The Clerk will not file any response to a petition for rehearing unless the Court requests a response. In the absence of extraordinary circumstances, the Court will not grant a petition for rehearing without first requesting a response.

4. The Clerk will not file consecutive petitions and petitions that are out of time under this Rule.

5. The Clerk will not file any brief for an *amicus curiae* in support of, or in opposition to, a petition for rehearing.

6. If the Clerk determines that a petition for rehearing submitted timely and in good faith is in a form that does not comply with this Rule or Rule 33 or Rule 34, the Clerk will return it with a letter indicating the deficiency. A corrected petition for rehearing received no more than 15 days after the date of the Clerk's letter will be deemed timely.

**Rule 45. Process; Mandates**

1. All process of this Court issues in the name of the President of the United States.

2. In a case on review from a state court, the mandate issues 25 days after entry of the judgment, unless the Court or a Justice shortens or extends the time, or unless the parties stipulate that it issue sooner. The filing of a petition for rehearing stays the mandate until disposition of the petition, unless the Court orders otherwise. If the petition is denied, the mandate issues forthwith.

3. In a case on review from any court of the United States, as defined by 28 U. S. C. § 451, a formal mandate does not issue unless specially directed; instead, the Clerk of this Court will send the clerk of the lower court a copy of the opinion or order of this Court and a certified copy of the judgment. The certified copy of the judgment, prepared and signed by this Court's Clerk, will provide for costs if any are awarded. In all other respects, the provisions of paragraph 2 of this Rule apply.

**Rule 46. Dismissing Cases**

1. At any stage of the proceedings, whenever all parties file with the Clerk an agreement in writing that a case be dismissed, specifying the terms for payment of costs, and pay to the Clerk any fees then due, the Clerk, without further reference to the Court, will enter an order of dismissal.

2. (a) A petitioner or appellant may file a motion to dismiss the case, with proof of service as required by Rule 29, tendering to the Clerk any fees due and costs payable. No more than 15 days after service thereof, an adverse party may file an objection, limited to the amount of damages and costs in this Court alleged to be payable or to showing that the moving party does not represent all petitioners or appellants. The Clerk will not file any objection not so limited.

(b) When the objection asserts that the moving party does not represent all the petitioners or appellants, the party moving for dismissal may file a reply within 10 days, after

which time the matter will be submitted to the Court for its determination.

(c) If no objection is filed—or if upon objection going only to the amount of damages and costs in this Court, the party moving for dismissal tenders the additional damages and costs in full within 10 days of the demand therefor—the Clerk, without further reference to the Court, will enter an order of dismissal. If, after objection as to the amount of damages and costs in this Court, the moving party does not respond by a tender within 10 days, the Clerk will report the matter to the Court for its determination.

3. No mandate or other process will issue on a dismissal under this Rule without an order of the Court.

## PART IX. DEFINITIONS AND EFFECTIVE DATE

### Rule 47. Reference to "State Court" and "State Law"

The term "state court," when used in these Rules, includes the District of Columbia Court of Appeals, the Supreme Court of the Commonwealth of Puerto Rico, the courts of the Northern Mariana Islands, and the local courts of Guam. References in these Rules to the statutes of a State include the statutes of the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the Territory of Guam.

### Rule 48. Effective Date of Rules

1. These Rules, adopted March 14, 2005, will be effective May 2, 2005.

2. The Rules govern all proceedings after their effective date except to the extent that, in the opinion of the Court, their application to a pending matter would not be feasible or would work an injustice, in which event the former procedure applies.

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# AMENDMENTS TO FEDERAL RULES OF APPELLATE PROCEDURE

The following amendments to the Federal Rules of Appellate Procedure were prescribed by the Supreme Court of the United States on April 25, 2005, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1152. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Appellate Procedure and amendments thereto, see 389 U. S. 1063, 398 U. S. 971, 401 U. S. 1029, 406 U. S. 1005, 441 U. S. 973, 475 U. S. 1153, 490 U. S. 1125, 500 U. S. 1007, 507 U. S. 1059, 511 U. S. 1155, 514 U. S. 1137, 517 U. S. 1255, 523 U. S. 1147, 535 U. S. 1123, and 538 U. S. 1071.

# LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 25, 2005

*To the Senate and House of Representatives of the United States of America in Congress Assembled:*

I have the honor to submit to the Congress the amendments to the Federal Rules of Appellate Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
*Chief Justice of the United States*

## SUPREME COURT OF THE UNITED STATES

APRIL 25, 2005

ORDERED:

1. That the Federal Rules of Appellate Procedure be, and they hereby are, amended by including therein amendments to Appellate Rules 4, 26, 27, 28, 32, 34, 35, 45, and new Rule 28.1.

[See *infra*, pp. 1155–1161.]

2. That the foregoing amendments to the Federal Rules of Appellate Procedure shall take effect on December 1, 2005, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Appellate Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

## AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

---

*Rule 4. Appeal as of right—when taken.*

(*a*) *Appeal in a civil case.*

. . . . .

(*6*) *Reopening the time to file an appeal.*—The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

. . . . .

*Rule 26. Computing and extending time.*

(*a*) *Computing time.*—The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

. . . . .

(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the chal-

lenged judgment or order, or the circuit clerk's principal office.

. . . . .

*Rule 27. Motions.*

. . . . .

(*d*) *Form of papers; page limits; and number of copies.*

(*1*) *Format.*

(*A*) *Reproduction.*—A motion, response, or reply may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(*B*) *Cover.*—A cover is not required, but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. If a cover is used, it must be white.

(*C*) *Binding.*—The document must be bound in any manner that is secure, does not obscure the text, and permits the document to lie reasonably flat when open.

(*D*) *Paper size, line spacing, and margins.*—The document must be on 8½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(*E*) *Typeface and type styles.*—The document must comply with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6).

. . . . .

*Rule 28. Briefs.*

. . . . .

(*c*) *Reply brief.*—The appellant may file a brief in reply to the appellee's brief. Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities—

cases (alphabetically arranged), statutes, and other authorities—with references to the pages of the reply brief where they are cited.

. . . . .

(*h*) *[Reserved.]*

. . . . .

*Rule 28.1. Cross-appeals.*

(*a*) *Applicability.*—This rule applies to a case in which a cross-appeal is filed. Rules 28(a)–(c), 31(a)(1), 32(a)(2), and 32(a)(7)(A)–(B) do not apply to such a case, except as otherwise provided in this rule.

(*b*) *Designation of appellant.*—The party who files a notice of appeal first is the appellant for the purposes of this rule and Rules 30 and 34. If notices are filed on the same day, the plaintiff in the proceeding below is the appellant. These designations may be modified by the parties' agreement or by court order.

(*c*) *Briefs.*—In a case involving a cross-appeal:

(*1*) *Appellant's principal brief.*—The appellant must file a principal brief in the appeal. That brief must comply with Rule 28(a).

(*2*) *Appellee's principal and response brief.*—The appellee must file a principal brief in the cross-appeal and must, in the same brief, respond to the principal brief in the appeal. That appellee's brief must comply with Rule 28(a), except that the brief need not include a statement of the case or a statement of the facts unless the appellee is dissatisfied with the appellant's statement.

(*3*) *Appellant's response and reply brief.*—The appellant must file a brief that responds to the principal brief in the cross-appeal and may, in the same brief, reply to the response in the appeal. That brief must comply with Rule 28(a)(2)–(9) and (11), except that none of the following need appear unless the appellant is dissatisfied with the appellee's statement in the cross-appeal:

(A) the jurisdictional statement;

(B) the statement of the issues;

(C) the statement of the case;

(D) the statement of the facts; and

(E) the statement of the standard of review.

(*4*) *Appellee's reply brief.*—The appellee may file a brief in reply to the response in the cross-appeal. That brief must comply with Rule 28(a)(2)–(3) and (11) and must be limited to the issues presented by the cross-appeal.

(*5*) *No further briefs.*—Unless the court permits, no further briefs may be filed in a case involving a cross-appeal.

(*d*) *Cover.*—Except for filings by unrepresented parties, the cover of the appellant's principal brief must be blue; the appellee's principal and response brief, red; the appellant's response and reply brief, yellow; the appellee's reply brief, gray; an intervenor's or amicus curiae's brief, green; and any supplemental brief, tan. The front cover of a brief must contain the information required by Rule 32(a)(2).

(*e*) *Length.*

(*1*) *Page limitation.*—Unless it complies with Rule 28.1(e)(2) and (3), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(*2*) *Type-volume limitation.*

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if:

(i) it contains no more than 14,000 words; or

(ii) it uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if:

(i) it contains no more than 16,500 words; or

(ii) it uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

(*3*) *Certificate of compliance.*—A brief submitted under Rule 28.1(e)(2) must comply with Rule 32(a)(7)(C).

(*f*) *Time to serve and file a brief.*—Briefs must be served and filed as follows:

(1) the appellant's principal brief, within 40 days after the record is filed;

(2) the appellee's principal and response brief, within 30 days after the appellant's principal brief is served;

(3) the appellant's response and reply brief, within 30 days after the appellee's principal and response brief is served; and

(4) the appellee's reply brief, within 14 days after the appellant's response and reply brief is served, but at least 3 days before argument unless the court, for good cause, allows a later filing.

*Rule 32. Form of briefs, appendices, and other papers.*

(*a*) *Form of a brief.*

. . . . .

(*7*) *Length.*

. . . . .

(*C*) *Certificate of compliance.*

(i) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rules 28.1(e)(3) and 32(a)(7)(C)(i).

. . . . .

*Rule 34. Oral argument.*

. . . . .

(*d*) *Cross-appeals and separate appeals.*—If there is a cross-appeal, Rule 28.1(b) determines which party is the appellant and which is the appellee for purposes of oral argument. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Separate parties should avoid duplicative argument.

. . . . .

*Rule 35. En banc determination.*

(*a*) *When hearing or rehearing en banc may be ordered.*—A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

. . . . .

*Rule 45. Clerk's duties.*

(*a*) *General provisions.*

. . . . .

(*2*) *When court is open.*—The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may

provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

. . . . .

# AMENDMENTS TO FEDERAL RULES OF BANKRUPTCY PROCEDURE

The following amendments to the Federal Rules of Bankruptcy Procedure were prescribed by the Supreme Court of the United States on April 25, 2005, pursuant to 28 U. S. C. § 2075, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1164. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2075, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Bankruptcy Procedure and amendments thereto, see, *e. g.*, 461 U. S. 973, 471 U. S. 1147, 480 U. S. 1077, 490 U. S. 1119, 500 U. S. 1017, 507 U. S. 1075, 511 U. S. 1169, 514 U. S. 1145, 517 U. S. 1263, 520 U. S. 1285, 526 U. S. 1169, 529 U. S. 1147, 532 U. S. 1077, 535 U. S. 1139, 538 U. S. 1075, and 541 U. S. 1097.

# LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 25, 2005

*To the Senate and House of Representatives of the United States of America in Congress Assembled:*

I have the honor to submit to the Congress the amendments to the Federal Rules of Bankruptcy Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
*Chief Justice of the United States*

## SUPREME COURT OF THE UNITED STATES

APRIL 25, 2005

ORDERED:

1. That the Federal Rules of Bankruptcy Procedure be, and they hereby are, amended by including therein amendments to Bankruptcy Rules 1007, 2002, 3004, 3005, 7004, 9001, 9006, and 9036.

[See *infra*, pp. 1167–1171.]

2. That the foregoing amendments to the Federal Rules of Bankruptcy Procedure shall take effect on December 1, 2005, and shall govern in all proceedings in bankruptcy cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Bankruptcy Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

# AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

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*Rule 1007. Lists, schedules, and statements; time limits.*

(*a*) *List of creditors and equity security holders, and corporate ownership statement.*

(*1*) *Voluntary case.*—In a voluntary case, the debtor shall file with the petition a list containing the name and address of each entity included or to be included on Schedules D, E, F, G, and H as prescribed by the Official Forms. If the debtor is a corporation, other than a governmental unit, the debtor shall file with the petition a corporate ownership statement containing the information described in Rule 7007.1. The debtor shall file a supplemental statement promptly upon any change in circumstances that renders the corporate ownership statement inaccurate.

(*2*) *Involuntary case.*—In an involuntary case, the debtor shall file within 15 days after entry of the order for relief, a list containing the name and address of each entity included or to be included on Schedules D, E, F, G, and H as prescribed by the Official Forms.

. . . . .

(*c*) *Time limits.*—In a voluntary case, the schedules and statements, other than the statement of intention, shall be filed with the petition, or within 15 days thereafter, except as otherwise provided in subdivisions (d), (e), (f), and (h) of this rule. In an involuntary case, the list in subdivision (a)(2), and the schedules and statements, other than the statement of intention, shall be filed by the debtor within 15 days of the entry of the order for relief. Lists, schedules, and statements filed prior to the conversion of a case to another chapter shall be deemed filed in the converted case unless the court directs otherwise. Any extension of time

for the filing of the schedules and statements may be granted only on motion for cause shown and on notice to the United States trustee and to any committee elected under § 705 or appointed under § 1102 of the Code, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

. . . . .

(*g*) *Partnership and partners.*—The general partners of a debtor partnership shall prepare and file the list required under subdivision (a), the schedules of the assets and liabilities, schedule of current income and expenditures, schedule of executory contracts and unexpired leases, and statement of financial affairs of the partnership. The court may order any general partner to file a statement of personal assets and liabilities within such time as the court may fix.

. . . . .

*Rule 2002. Notices to creditors, equity security holders, United States, and United States trustee.*

. . . . .

(*g*) *Addressing notices.*

(1) Notices required to be mailed under Rule 2002 to a creditor, indenture trustee, or equity security holder shall be addressed as such entity or an authorized agent has directed in its last request filed in the particular case. For the purposes of this subdivision—

(A) a proof of claim filed by a creditor or indenture trustee that designates a mailing address constitutes a filed request to mail notices to that address, unless a notice of no dividend has been given under Rule 2002(e) and a later notice of possible dividend under Rule 3002(c)(5) has not been given; and

(B) a proof of interest filed by an equity security holder that designates a mailing address constitutes a filed request to mail notices to that address.

(2) If a creditor or indenture trustee has not filed a request designating a mailing address under Rule 2002(g)(1),

the notices shall be mailed to the address shown on the list of creditors or schedule of liabilities, whichever is filed later. If an equity security holder has not filed a request designating a mailing address under Rule 2002(g)(1), the notices shall be mailed to the address shown on the list of equity security holders.

(3) If a list or schedule filed under Rule 1007 includes the name and address of a legal representative of an infant or incompetent person, and a person other than that representative files a request or proof of claim designating a name and mailing address that differs from the name and address of the representative included in the list or schedule, unless the court orders otherwise, notices under Rule 2002 shall be mailed to the representative included in the list or schedules and to the name and address designated in the request or proof of claim.

(4) Notwithstanding Rule 2002(g)(1)–(3), an entity and a notice provider may agree that when the notice provider is directed by the court to give a notice, the notice provider shall give the notice to the entity in the manner agreed to and at the address or addresses the entity supplies to the notice provider. That address is conclusively presumed to be a proper address for the notice. The notice provider's failure to use the supplied address does not invalidate any notice that is otherwise effective under applicable law.

. . . . .

*Rule 3004. Filing of claims by debtor or trustee.*

If a creditor does not timely file a proof of claim under Rule 3002(c) or 3003(c), the debtor or trustee may file a proof of the claim within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable. The clerk shall forthwith give notice of the filing to the creditor, the debtor and the trustee.

*Rule 3005. Filing of claim, acceptance, or rejection by guarantor, surety, indorser, or other codebtor.*

(*a*) *Filing of claim.*—If a creditor does not timely file a proof of claim under Rule 3002(c) or 3003(c), any entity that

is or may be liable with the debtor to that creditor, or who has secured that creditor, may file a proof of the claim within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or Rule 3003(c) whichever is applicable. No distribution shall be made on the claim except on satisfactory proof that the original debt will be diminished by the amount of distribution.

. . . . .

*Rule 7004. Process; service of summons, complaint.*

(*a*) *Summons; service; proof of service.*

(1) Except as provided in Rule 7004(a)(2), Rule 4(a), (b), (c)(1), (d)(1), (e)–(j), (*l*), and (m) F. R. Civ. P. applies in adversary proceedings. Personal service under Rule 4(e)–(j) F. R. Civ. P. may be made by any person at least 18 years of age who is not a party, and the summons may be delivered by the clerk to any such person.

(2) The clerk may sign, seal, and issue a summons electronically by putting an "s/" before the clerk's name and including the court's seal on the summons.

. . . . .

*Rule 9001. General definitions.*

. . . . .

(9) "Notice provider" means any entity approved by the Administrative Office of the United States Courts to give notice to creditors under Rule 2002(g)(4).

(10) "Regular associate" means any attorney regularly employed by, associated with, or counsel to an individual or firm.

(11) "Trustee" includes a debtor in possession in a chapter 11 case.

(12) "United States trustee" includes an assistant United States trustee and any designee of the United States trustee.

*Rule 9006. Time.*

. . . . .

(*f*) *Additional time after service by mail or under Rule 5(b)(2)(C) or (D) F. R. Civ. P.*—When there is a right or

requirement to act or undertake some proceedings within a prescribed period after service and that service is by mail or under Rule 5(b)(2)(C) or (D) F. R. Civ. P., three days are added after the prescribed period would otherwise expire under Rule 9006(a).

. . . . .

*Rule 9036. Notice by electronic transmission.*

Whenever the clerk or some other person as directed by the court is required to send notice by mail and the entity entitled to receive the notice requests in writing that, instead of notice by mail, all or part of the information required to be contained in the notice be sent by a specified type of electronic transmission, the court may direct the clerk or other person to send the information by such electronic transmission. Notice by electronic means is complete on transmission.

# AMENDMENTS TO FEDERAL RULES OF CIVIL PROCEDURE

The following amendments to the Federal Rules of Civil Procedure were prescribed by the Supreme Court of the United States on April 25, 2005, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1174. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Civil Procedure and amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009, 374 U. S. 861, 383 U. S. 1029, 389 U. S. 1121, 398 U. S. 977, 401 U. S. 1017, 419 U. S. 1133, 446 U. S. 995, 456 U. S. 1013, 461 U. S. 1095, 471 U. S. 1153, 480 U. S. 953, 485 U. S. 1043, 500 U. S. 963, 507 U. S. 1089, 514 U. S. 1151, 517 U. S. 1279, 520 U. S. 1305, 523 U. S. 1221, 526 U. S. 1183, 529 U. S. 1155, 532 U. S. 1085, 535 U. S. 1147, and 538 U. S. 1083.

# LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 25, 2005

*To the Senate and House of Representatives of the United States of America in Congress Assembled:*

I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
*Chief Justice of the United States*

## SUPREME COURT OF THE UNITED STATES

APRIL 25, 2005

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein the amendments to Civil Rules 6, 27, and 45, and to Rules B and C of the Supplemental Rules for Certain Admiralty and Maritime Claims.

[See *infra*, pp. 1177–1180.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure and the Supplemental Rules for Certain Admiralty and Maritime Claims shall take effect on December 1, 2005, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

# AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

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*Rule 6. Time.*

. . . . .

(*e*) *Additional time after certain kinds of service.*—Whenever a party must or may act within a prescribed period after service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days are added after the prescribed period would otherwise expire under subdivision (a).

. . . . .

*Rule 27. Depositions before action or pending appeal.*

(*a*) *Before action.*

. . . . .

(*2*) *Notice and service.*—At least 20 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the district or state in the manner provided in Rule 4. If that service cannot be made with due diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided by Rule 4 and to cross-examine the deponent if an unserved person is not otherwise represented. Rule 17(c) applies if any expected adverse party is a minor or is incompetent.

. . . . .

*Rule 45. Subpoena.*

(*a*) *Form; issuance.*

. . . . .

(2) A subpoena must issue as follows:

(A) for attendance at a trial or hearing, from the court for the district where the trial or hearing is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken, stating the method for recording the testimony; and

(C) for production and inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

. . . . .

# AMENDMENTS TO THE SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

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*Rule B. In personam actions: attachment and garnishment.*

(*1*) *When available; complaint, affidavit, judicial authorization, and process.*—In an in personam action:

(a) If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property—up to the amount sued for—in the hands of garnishees named in the process.

. . . . .

*Rule C. In rem actions: special provisions.*

. . . . .

(*6*) *Responsive pleading; interrogatories.*

. . . . .

(*b*) *Maritime arrests and other proceedings.*—In an in rem action not governed by Rule C(6)(a):

(i) a person who asserts a right of possession or any ownership interest in the property that is the subject of the action must file a verified statement of right or interest:

(A) within 10 days after the execution of process, or

(B) within the time that the court allows;

(ii) the statement of right or interest must describe the interest in the property that supports the person's demand for its restitution or right to defend the action;

(iii) an agent, bailee, or attorney must state the authority to file a statement of right or interest on behalf of another; and

(iv) a person who asserts a right of possession or any ownership interest must serve an answer within 20 days after filing the statement of interest or right.

. . . . .

# AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

The following amendments to the Federal Rules of Criminal Procedure were prescribed by the Supreme Court of the United States on April 25, 2005, pursuant to 28 U. S. C. § 2072, and were reported to Congress by THE CHIEF JUSTICE on the same date. For the letter of transmittal, see *post*, p. 1182. The Judicial Conference report referred to in that letter is not reproduced herein.

Note that under 28 U. S. C. § 2074, such amendments shall take effect no earlier than December 1 of the year in which they are transmitted to Congress unless otherwise provided by law.

For earlier publication of the Federal Rules of Criminal Procedure, and amendments thereto, see 327 U. S. 821, 335 U. S. 917, 949, 346 U. S. 941, 350 U. S. 1017, 383 U. S. 1087, 389 U. S. 1125, 401 U. S. 1025, 406 U. S. 979, 415 U. S. 1056, 416 U. S. 1001, 419 U. S. 1136, 425 U. S. 1157, 441 U. S. 985, 456 U. S. 1021, 461 U. S. 1117, 471 U. S. 1167, 480 U. S. 1041, 485 U. S. 1057, 490 U. S. 1135, 495 U. S. 967, 500 U. S. 991, 507 U. S. 1161, 511 U. S. 1175, 514 U. S. 1159, 517 U. S. 1285, 520 U. S. 1313, 523 U. S. 1227, 526 U. S. 1189, 529 U. S. 1179, 535 U. S. 1157, and 541 U. S. 1103.

# LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.

APRIL 25, 2005

*To the Senate and House of Representatives of the United States of America in Congress Assembled:*

I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

(Signed) WILLIAM H. REHNQUIST
*Chief Justice of the United States*

## SUPREME COURT OF THE UNITED STATES

APRIL 25, 2005

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 12.2, 29, 32.1, 33, 34, 45, and new Rule 59.

[See *infra*, pp. 1185–1188.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2005, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

# AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

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*Rule 12.2. Notice of an insanity defense; mental examination.*

. . . . .

(*d*) *Failure to comply.*

(*1*) *Failure to give notice or to submit to examination.*—The court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt or the issue of punishment in a capital case if the defendant fails to:

(A) give notice under Rule 12.2(b); or

(B) submit to an examination when ordered under Rule 12.2(c).

(*2*) *Failure to disclose.*—The court may exclude any expert evidence for which the defendant has failed to comply with the disclosure requirement of Rule 12.2(c)(3).

. . . . .

*Rule 29. Motion for a judgment of acquittal.*

. . . . .

(*c*) *After jury verdict or discharge.*

(*1*) *Time for a motion.*—A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later.

. . . . .

*Rule 32.1. Revoking or modifying probation or supervised release.*

. . . . .

(*b*) *Revocation.*

. . . . .

(2) *Revocation hearing.*—Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to:

(A) written notice of the alleged violation;

(B) disclosure of the evidence against the person;

(C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear;

(D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and

(E) an opportunity to make a statement and present any information in mitigation.

(c) *Modification.*

(1) *In general.*—Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to counsel and an opportunity to make a statement and present any information in mitigation.

. . . . .

*Rule 33. New trial.*

. . . . .

(b) *Time to file.*

. . . . .

(2) *Other grounds.*—Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty.

*Rule 34. Arresting judgment.*

. . . . .

(b) *Time to file.*—The defendant must move to arrest judgment within 7 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere.

*Rule 45. Computing and extending time.*

. . . . .

(*b*) *Extending time.*

(*1*) *In general.*—When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made:

(A) before the originally prescribed or previously extended time expires; or

(B) after the time expires if the party failed to act because of excusable neglect.

(*2*) *Exception.*—The court may not extend the time to take any action under Rule 35, except as stated in that rule.

. . . . .

*Rule 59. Matters before a magistrate judge.*

(*a*) *Nondispositive matters.*—A district judge may refer to a magistrate judge for determination any matter that does not dispose of a charge or defense. The magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record an oral or written order stating the determination. A party may serve and file objections to the order within 10 days after being served with a copy of a written order or after the oral order is stated on the record, or at some other time the court sets. The district judge must consider timely objections and modify or set aside any part of the order that is contrary to law or clearly erroneous. Failure to object in accordance with this rule waives a party's right to review.

(*b*) *Dispositive matters.*

(*1*) *Referral to magistrate judge.*—A district judge may refer to a magistrate judge for recommendation a defendant's motion to dismiss or quash an indictment or information, a motion to suppress evidence, or any matter that may dispose of a charge or defense. The magistrate judge must promptly conduct the required proceedings. A record must be made of any evidentiary proceeding and of any other proceeding if the magistrate judge considers it necessary. The magistrate judge must enter on the record a recommendation for disposing of the matter, including any proposed

findings of fact. The clerk must immediately serve copies on all parties.

(2) *Objections to findings and recommendations.*—Within 10 days after being served with a copy of the recommended disposition, or at some other time the court sets, a party may serve and file specific written objections to the proposed findings and recommendations. Unless the district judge directs otherwise, the objecting party must promptly arrange for transcribing the record, or whatever portions of it the parties agree to or the magistrate judge considers sufficient. Failure to object in accordance with this rule waives a party's right to review.

(3) *De novo review of recommendations.*—The district judge must consider de novo any objection to the magistrate judge's recommendation. The district judge may accept, reject, or modify the recommendation, receive further evidence, or resubmit the matter to the magistrate judge with instructions.

## Reporter's Note

The next page is purposely numbered 1301. The numbers between 1188 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

## OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

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## MULTIMEDIA HOLDINGS CORP., DBA FIRST COAST NEWS *v.* CIRCUIT COURT OF FLORIDA, ST. JOHNS COUNTY

ON APPLICATION FOR STAY

No. 04A773. Decided April 15, 2005

An application to stay two Florida Circuit Court orders on the ground that they restrict applicant television network from publishing transcripts of grand jury proceedings is denied. The first order, issued after the court discovered that copies of a transcript had been released to the press in apparent violation of Fla. Stat. § 905.27, directed that no party could further disclose the transcript's contents to a person not authorized by that law. The second order denied applicant's motion to intervene and set the first order aside as an unconstitutional prior restraint; noted that the order applied only to the parties; and concluded that applicant was not restrained from publishing the materials, though to do so might constitute further violations of the law. The State Court of Appeal denied review. The record here does not sufficiently establish that applicant is enjoined by or otherwise subject to the orders or that any threat to applicant is real or substantial. Assuming that the first order constituted a prior restraint, any chilling effect it had on speech was substantially diminished by the second order, which indicates that the court directed its order only to the parties to the action and which forecloses interpreting the first order to put applicant on notice that future publication would place it in contempt. Nor is applicant's fear of prosecution well founded. Since the state attorney, not the judge, has the authority to prosecute violations of the Florida law, the court's orders are not a prerequisite to prosecution. Applicant has not demonstrated that prosecution is any more likely because of the orders, and the State has suggested that it will not prosecute further publication of the transcript.

JUSTICE KENNEDY, Circuit Justice.

This is an application for a stay of orders of the Seventh Judicial Circuit Court of St. Johns County, Florida. The applicant, First Coast News, alleges the orders restrict its publication of the contents of transcripts of grand jury proceedings held in a criminal prosecution for murder. First Coast News is a local television network that has been covering the prosecution. For reasons to be discussed, the application is denied.

I

Two orders are at issue. The first was entered July 30, 2004. It states the court had discovered that copies of the transcript of certain testimony before the grand jury had been released to members of the press as well as to investigators from the St. Johns County Sheriff's Office, in apparent violation of Fla. Stat. § 905.27 (2003). Section 905.27 generally prohibits the disclosure of grand jury testimony, with certain exceptions. As relevant here, the order directs that "[n]o party shall further disclose the contents of the transcript of testimony before the Grand Jury to any person not authorized by F. S. 905.27(2)." Order Sealing Transcript, etc., in No. 04001748 CF (Fla. Cir. Ct., July 30, 2004), p. 2, App. in Support of Stay Application, Tab 5 (hereinafter July 30 Order). It further provides that "[a]ll persons who have obtained a copy of the transcript are placed on notice that any broadcast, publication, disclosure or communication of the contents of this transcript is a violation of F. S. 905.27, punishable as a misdemeanor in addition to constituting grounds for Criminal Contempt of Court." *Ibid.* Applicant alleges it received a copy of this order from the court. See Application to Stay Prior Restraint Order 3.

Applicant moved to intervene and set aside the July 30 Order as an unconstitutional prior restraint. This appears to have prompted the trial court to enter a second order.

The order, entered August 9, 2004, notes that "[a]t no point in the Court's [July 30 Order] is [applicant] precluded or restrained from publishing matters which are public record, nor is [applicant] enjoined or restrained from broadcasting matters in this case. The [July 30 Order] clearly provides that the parties to this action are enjoined from further disclosing the contents of the transcript of testimony before the Grand Jury to any person not authorized by F. S. 905.27(2). The parties to this action are the State of Florida . . . and defense counsel." Order on Motion to Intervene, etc., in No. CF04–1478 (Fla. Cir. Ct., Aug. 9, 2004), pp. 1–2, App. in Support of Stay Application, Tab 10 (hereinafter Aug. 9 Order). The court declined to hold a hearing on applicant's motion because "the Court's order does not enjoin the [applicant] from publishing or broadcasting materials that it wishes to publish or broadcast, but rather solely points out that so to do might constitute further violations of criminal law." *Id.*, at 2. The court denied applicant's motion to intervene and its motion to set aside the July 30 Order.

Applicant sought review in the Fifth District Court of Appeal of Florida, which denied, without comment, applicant's "Emergency Petition for Writ of Certiorari." On the basis that the Fifth District Court of Appeal's denial is not appealable to the Florida Supreme Court, see Fla. Rule App. Proc. 9.030(a)(2)(A)(ii) (2005), applicant filed with me as Circuit Justice an application for a stay of the orders, urging that they operate as a prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution. The application for a stay is denied. It is not sufficiently established on this record that applicant is enjoined by or otherwise subject to the orders in question or that any threat to it is real or substantial; hence it is unlikely that, despite indications that a prior restraint may have been imposed at the time of the first order, four Members of the Court would vote to grant certiorari.

II

Applicant argues that the orders operate as a prior restraint because they threaten prosecution for future disclosures of the transcript and for contempt of court for any future publication. Specifically, the July 30 Order, at 2, places "[a]ll persons who have obtained a copy of the transcript . . . on notice that any broadcast, publication, disclosure or communication of the contents of this transcript is a violation of F. S. 905.27, punishable as a misdemeanor in addition to constituting grounds for Criminal Contempt of Court." This would apply to applicant, as it fell within the class of persons who had obtained a copy of the transcript.

A threat of prosecution or criminal contempt against a specific publication raises special First Amendment concerns, for it may chill protected speech much like an injunction against speech by putting that party at an added risk of liability. The court's first order was not accompanied by notice or hearing or any other of the usual safeguards of the judicial process. It bears many of the marks of a prior restraint. See *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58 (1963).

The first order is of further concern because it singles out this applicant and could be interpreted to place it on notice that publication of grand jury testimony in the underlying case could subject it to prosecution or place it in contempt of court. Assuming that order constituted a prior restraint, however, any chilling effect it had on speech was substantially diminished by the court's second order.

That second order indicates that the court was directing its order only to the conduct of those who are parties to the underlying action. Applicant is not a party. See Aug. 9 Order, at 1 ("The Court's order clearly provides that the parties to this action are enjoined . . . "); *id.*, at 2 ("[T]he Court's order does not enjoin the movant [applicant] in this case . . . "). In this respect the orders themselves, by their terms, do not prohibit speech by this applicant.

In addition, the second order forecloses interpreting the first order to put applicant on notice that future publication would place it in contempt. It notes that "the Court's order does not enjoin [applicant] from publishing or broadcasting materials that it wishes to . . . but rather solely points out that so to do might constitute further violations of criminal law." *Ibid.*

To the extent the court's orders might suggest a particular animus toward applicant, that, too, has abated by virtue of the fact that the judge who entered them has retired from judicial service.

Applicant argues that aside from the possibility of being held in contempt, it fears prosecution by virtue of the orders. Although it is true that "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings," *Bantam Books*, *supra*, at 68, there is no suggestion that the judge who entered the orders here could institute such a proceeding. In Florida, it does not appear that the court may itself institute a prosecution for a violation of Fla. Stat. § 905.27 (2003). The decision to charge and prosecute is an executive responsibility, and the state attorney has complete discretion in deciding whether and how to do so. See *State* v. *Bloom*, 497 So. 2d 2, 3 (Fla. 1986) (citing Fla. Const., Art. II, § 3). See also *State* v. *Johns*, 651 So. 2d 1227, 1228 (Fla. App. 1995) ("The decision of whether to prosecute for a criminal offense is a function of the executive authority, not the trial court"). The court's orders are thus not a prerequisite to prosecution, nor does the application demonstrate that prosecution is any more likely because of them. If prosecutors deemed applicant's future publication to constitute a violation of Fla. Stat. § 905.27 (2003), they would be free to prosecute applicant with or without the court's orders. The court recognized as much when it stated in its Aug. 9 Order, at 2, that "[t]he question of whether the publication or broadcast of this information is a crime, is one

which must be left up to further investigation and proper prosecution."

Although the State has not guaranteed applicant immunity from prosecution for future publication of the transcript, it has suggested that further publication will not be prosecuted. See State's Response to Application to Stay Prior Restraint Order 4–5 ("Because the State Attorney did not believe that Petitioner violated the grand jury secrecy statute . . . further publication of the grand jury transcript would not have resulted in prosecution").

True, informal procedures undertaken by officials and designed to chill expression can constitute a prior restraint. See *Bantam Books*, *supra*. Warnings from a court have added weight, and this too has a bearing on whether there is a prior restraint. If it were to be shown that even the second order might give a reporter or television station singled out earlier any real cause for concern, the case for intervention would be stronger. It appears, however, that any threat once implicit in the court's first order is much diminished. The two orders, issued by a judge no longer in office, appear to have been isolated phenomena, not a regular or customary practice. Cf. *ibid.* Under these circumstances, in my view, there is no reasonable probability this Court would grant a writ of certiorari. See *Graves* v. *Barnes*, 405 U. S. 1201, 1203 (1972) (Powell, J., in chambers). The application for a stay of the orders pending the filing of a petition for a writ of certiorari is denied.

*It is so ordered.*

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